Federal Estate Tax Recovery Code Sections: Amend or Repeal

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INTRODUCTION

The Internal Revenue Code contains five code sections which grant certain individuals the right to recover estate taxes from others.[1] These five code sections were enacted over a period of seventy-two years.[2] Because of the manner in which they were enacted, they contain numerous inconsistencies.[3] Only one effort has been made to correct these inconsistencies.[4] In Part I of this article, we examine the numerous remaining inconsistencies. In Part II, we examine the historical development of these code sections to demonstrate the ad hoc manner in which they were enacted. In addition, we demonstrate that Congress has never fully examined whether recovery of estate taxes should be extended to all non-probate inclusionary code sections and whether federal tax recovery is even needed any longer. In Part III, we examine the current status of tax apportionment in the states and the District of Columbia. In Part IV, we briefly examine recommendations made by academics and other commentators concerning these tax recovery code sections. In Part V, we present three competing arguments: (1) the federal tax recovery code sections should be replaced with a comprehensive tax apportionment statute; (2) the federal tax recovery code sections should be amended to address the inconsistencies set forth herein; and (3) the federal tax recovery code sections should be repealed. Lastly, in Part VI, we conclude.

PART I: INCONSISTENCIES AND ISSUES

A. Section 2205

The Internal Revenue Code imposes upon the executor the duty to pay federal estate taxes.[5] This duty has rested upon the executor from the time of the first federal estate tax in 1916.[6] This duty is premised upon the assumption that the executor will pay the tax before the

[1] 26 U.S. Code §§2205, 2206, 2207, 2207A and 2207B. Hereinafter all references are to the Internal Revenue Code of 1986, as amended, unless otherwise noted.

[2] *See infra* Part II for a detailed analysis of the historical development of these code sections.

[3] *See infra* Part I for a detailed analysis of the inconsistencies.

[4] *See infra* Part II(L) in which the provisions of the Taxpayer Relief Act of 1997 are discussed.

[5] §2002.

[6] Revenue Act of 1916, Pub. No. 271, Ch. 643, 39 Stat. 756, Sept. 8, 1916, §207.

distribution of the estate.[7] In the event that a person, other than the executor, paid an estate tax charged to another, §208 of the Revenue Act of 1916 provided the following:

> If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution. [8]

These identical words now appear in §2205. The only change since 1916 has been to advance the second comma appearing after the term "possession of" twelve words forward, so that it now appears after the phrase "out of."

The right of recovery in section §2205 is not granted to the executor.[9] It is only granted to other individuals who pay more than their share of the tax. The code section grants these individuals the right to recover the tax paid from "the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution." Significantly, the code section does not identify whose interest would have been reduced by the tax. In other words, §2205 does not apportion estate taxes. As a consequence, with few exceptions the apportionment of estate taxes has been left to the states.[10] Generally, the executor and any other beneficiary who has paid more than his or her apportioned portion of the estate taxes has sought recovery in the state court overseeing the administration of the decedent's estate, based either on state tax apportionment statutes or on general equitable principles.[11] Section 2205 is rarely employed as the foundation for recovery.

B. Sections 2206, 2207, 2207A & 2207B[12]

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[7] *Id.,* §208.
[8] *Id*.
[9] Donna Litman, *Apportionment of the Federal Estate Tax – Effect of Selective Federal Apportionment and Need for Reform*, 33 REAL PROP., PROB. & TR. J. 327, 358 (1998).
[10] Pennell, 834-2nd T.M., *Transfer Tax Payment and Apportionment*, II(C)(1). The exceptions are discussed *infra* in Part I(B).
[11] *See* the numerous cases referenced in Maurice T. Brunner, Annotation, *Ultimate Burden of Estate Tax in Absence of Statute, Will, or Other Provision*, 68 A.L.R.3D 714 (1976) and Maurice T. Brunner, Annotation, *Construction and Application of Statutes Apportioning or Prorating Estate Taxes*, 71 A.L.R.3D 247 (1976). Section 10 of the Uniform Estate Tax Apportionment Act (2003) , enacted in some states, grants individuals a right to recover estate taxes that they have paid which are not apportioned to them.
[12] Code sections as they currently appear in the Internal Revenue Code of 1986, as amended:

§ 2206. Liability of life insurance beneficiaries

Unless the decedent directs otherwise in his will, if any part of the gross estate on which tax has been paid consists of proceeds of policies of insurance on the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds of such policies bear to the taxable estate. If there is more than one such beneficiary, the executor shall be entitled to recover from such beneficiaries in the same ratio. In the case of such proceeds receivable by the surviving spouse of the decedent for which a deduction is allowed under section 2056 (relating to marital deduction), this section shall not apply to such proceeds except as to the amount thereof in excess of the aggregate amount of the marital deductions allowed under such section.

§ 2207. Liability of recipient of property over which decedent had power of appointment

Unless the decedent directs otherwise in his will, if any part of the gross estate on which the tax has been paid consists of the value of property included in the gross estate under section 2041, the executor shall be entitled to recover from the person receiving such property by reason of the exercise, nonexercise, or release of a power of appointment such portion of the total tax paid as the value of such property bears to the taxable estate. If there is more than one such person, the executor shall be entitled to recover from such persons in the same ratio. In the case of such property received by the surviving spouse of the decedent for which a deduction is allowed under section 2056 (relating to marital deduction), this section shall not apply to such property except as to the value thereof reduced by an amount equal to the excess of the aggregate amount of the marital deductions allowed under section 2056 over the amount of proceeds of insurance upon the life of the decedent receivable by the surviving spouse for which proceeds a marital deduction is allowed under such section.

§ 2207A. Right of recovery in the case of certain marital deduction property

(a) Recovery with respect to estate tax

(1) In general

If any part of the gross estate consists of property the value of which is includible in the gross estate by reason of section 2044 (relating to certain property for which marital deduction was previously allowed), the decedent's estate shall be entitled to recover from the person receiving the property the amount by which—

(A) the total tax under this chapter which has been paid, exceeds

(B) the total tax under this chapter which would have been payable if the value of such property had not been included in the gross estate.

(2) Decedent may otherwise direct

Paragraph (1) shall not apply with respect to any property to the extent that the decedent in his will (or a revocable trust) specifically indicates an intent to waive any right of recovery under this subchapter with respect to such property.

(b) Recovery with respect to gift tax

If for any calendar year tax is paid under chapter 12 with respect to any person by reason of property treated as transferred by such person under section 2519, such person shall be entitled to recover from the person receiving the property the amount by which—

(1) the total tax for such year under chapter 12, exceeds

(2) the total tax which would have been payable under such chapter for such year if the value of such property had not been taken into account for purposes of chapter 12.

Sections 2206, 2207, 2207A and 2207B grant the executor or the decedent's estate a right to recover from certain individuals a portion of the estate taxes arising from specified non-probate properties being included in the federal gross estate. Section 2206 permits the executor the right to recover a pro rata portion of the estate taxes from beneficiaries of life insurance policies on the decedent's life. Section 2207 permits the executor the right to recover a pro rata portion of the estate taxes from persons receiving property arising from the exercise, non-exercise, or release of a general power of appointment. Section 2207A permits the decedent's estate the right to recover the additional estate taxes caused by the inclusion of qualified terminable interest property (QTIP) in the federal gross estate. Section 2207B permits the decedent's estate the right to recover a pro rata portion of the estate taxes from persons receiving property includible in the gross estate due to a retained life estate.

1. Federal Preemption

As discussed infra Part II(B)(2), the U.S. Supreme Court in *Riggs v. Del Drago* held the predecessor to §2205 did not preempt state law as to the apportionment of estate taxes. In that

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(c) More than one recipient of property

For purposes of this section, if there is more than one person receiving the property, the right of recovery shall be against each such person.

(d) Taxes and interest

In the case of penalties and interest attributable to additional taxes described in subsections (a) and (b), rules similar to subsections (a), (b), and (c) shall apply.

§ 2207B. Right of recovery where decedent retained interest

(a) Estate tax

(1) In general

If any part of the gross estate on which tax has been paid consists of the value of property included in the gross estate by reason of section 2036 (relating to transfers with retained life estate), the decedent's estate shall be entitled to recover from the person receiving the property the amount which bears the same ratio to the total tax under this chapter which has been paid as—

(A) the value of such property, bears to

(B) the taxable estate.

(2) Decedent may otherwise direct

Paragraph (1) shall not apply with respect to any property to the extent that the decedent in his will (or a revocable trust) specifically indicates an intent to waive any right of recovery under this subchapter with respect to such property.

(b) More than one recipient

For purposes of this section, if there is more than 1 person receiving the property, the right of recovery shall be against each such person.

(c) Penalties and interest

In the case of penalties and interest attributable to the additional taxes described in subsection (a), rules similar to the rules of subsections (a) and (b) shall apply.

(d) No right of recovery against charitable remainder trusts

No person shall be entitled to recover any amount by reason of this section from a trust to which section 664 applies (determined without regard to this section).

case, pre-residuary beneficiaries argued that the predecessor to §2205 imposed all of the estate taxes on the residuary estate and preempted New York law which apportioned a pro rata portion of the estate taxes to the pre-residuary beneficiaries.[13] The pre-residuary beneficiaries argued the predecessors to §§2206 and 2207 evidenced Congressional preemption. The Supreme Court noted "these sections [predecessors to §§2206 and 2207] deal with property which does not pass through the executor's hands and the Congressional direction with regard to such property is wholly compatible with the intent to leave the determination of the burden of the estate tax to state law as to properties handled as part of the estate by the executor."[14] While the language is dicta, the Court's comment has been followed by the courts.[15] Courts have consistently held that state law governs the apportionment of estate taxes on probate property.[16]On the other hand, an overwhelming majority of the courts have held that §§2206, 2207, and 2207A preempt state law

[13] Riggs v. Del Drago, 317 U.S. 95, 63 S.Ct. 109 (1942).
[14] *Id.* at 317 U.S. 102.
[15] *See* following cases:

As to §2206: Fagan v. Comm'r, T.C. Memo 1999-46 (1999); Estate of Cohen, 954 S.W.2d 409 (Mo. App. 1997); Tovrea v. Nolan, 173 Ariz. 568, 845 P.2d 494 (Ariz. App. 1992); McAleer v. Jernigan, 804 F.2d 1231 (8th Cir. 1986); First Nat'l Bank of Shelby v. Dixon, 38 N.C. 430, 248 S.E.2d 416 (N.C. App. 1978); Estate of Ogburn, 406 P.2d 655 (Wyo. 1965); Priedeman v. Jamison, 356 Mo. 627, 202 S.W.2d 900 (Mo. 1947). Tovrea v. Nolan, 173 Ariz. 568, 845 P.2d 494 (Ariz. App. 1992) holds section even preempts state law as to state estate taxes.

As to §2207: King v. United Jewish Appeal, 22 N.Y.2d 456, 239 N.E.2d 875 (NY App. 1968). *See* also Webb H. Coe Marital and Residuary Trusts, 233 Mich. App. 525, 593 N.W.2d 190 (Mich. App. 1999) wherein the Court notes federal preemption abounds but looks to Michigan case law to define "direction otherwise" language in §2207. *See* to the contrary, Gellerstedt v. United Missouri Bank of Kansas City, 865 S.W.2d 707 (Mo. App. 1993) wherein the court states that §2207 does not designate out of what fund the tax is payable and applies state law.

As to §2207A: In Re Blauhorn Revocable Trust, 275 Neb. 256, 746 N.W.2d 136 (Neb. 2008); Eisenbach v. Schneider, 140 Wash. App. 641, 166 P.3d 858 (Wash. App. 2007); Firstar Trust Co. v. First Nat'l Bank of Kenosha, Will of Cooney, 197 Wis.2d 484, 541 N.W.2d 467 (Wis. 1995)-court looks to state law to define "otherwise direction" in §2207A; Maurice F. Jones Trust v. Barnett Banks Trust Co., 637 N.E. 2d 1301 (Ind. App. 1994) -notes §2207A controls - looks to Florida law to define "direct otherwise"; Estate of Kramer, 610 N.Y.S.2d 31, 203 A.D.2d 78 (N.Y. App. 1994) - notes §2207A but solely analyzes EPTL §2-1.8(d-1); Matter of Probate of Will of Samuel Lee, 910 A.2d 634 (N.J. App. 2006); Estate of Stark, 2011 WL 3687421 (N.J. App. 2011)(unpublished). *See* to the contrary, Estate of Vahltiech, 69 F.3d 537 (6th Cir. 1995)(unpublished decision). In Estate of Klarner, 113 P.3d 150 (Colo. 2005), the Court held that §2207A preempted state law as to state estate tax. But, the majority of the courts have held that §2207A does not preempt state law as to the apportionment of state estate taxes. *See* Matter of Probate of Will of Samuel Lee, 910 A.2d 634 (N.J. App. 2006); Forrester v. Forrester, 914 So.2d 855 (Ala. 2005); Will of Adair, 149 N.J. 591, 695 A.2d 250 (N.J. 1997); Firstar Trust Co. v. First Nat'l Bank of Kenosha, Will of Cooney, 197 Wis.2d 484, 541 N.W.2d 467 (Wis. 1995); Cleveland v. Compass Bank, 652 So.2d 1134 (Ala. 1994); Estate of Stark, 2011 WL 3687421 (N.J. App. 2011)(unpublished).
[16] *See supra* footnote 10.

as to apportionment of federal estate taxes addressed by their coverage.[17] No published decisions address the federal preemption of §2207B.

A review of the decisions concerning federal preemption reveals the difficulties associated with these federal recovery provisions. While courts reference federal preemption, the courts invariably look to their state's statutory and common law to determine what evidence is permitted to determine intent and the standard necessary to overcome any presumptions. Several cases have noted that §§2206, 2207 or 2207A control yet only cite to decisions from their own state in order to determine if the decedent directed against the application set forth in §§2206, 2207 or 2207A.[18] Presumably, cases in all jurisdictions that address §§2206, 2207 or 2207A would serve as guidance, although admittedly they are not controlling in another jurisdiction. None of the cases attempt to establish a federal method of determining intent. Currently, the actions necessary to direct against the application of these four code sections will depend greatly on each state's statutory and common law even though a federal statute is being examined.

2. Selective Recovery Inclusion

These four code sections permit the executor or the decedent's estate the right to recover from beneficiaries receiving non-probate property includible in the gross estate by reason of §§ 2042(2) (life insurance), 2041 (general powers of appointment), 2044 (QTIP) and 2036(a) (retained life interest). The executor is not given the right to recover estate taxes arising from other non-probate properties includible in the gross estate, such as §§2035 (transfers within 3 years), 2037 (reversionary interests), 2038 (revocable transfers), and 2039 (annuities). There is no logical justification for permitting the executor the right to recover estate taxes for inclusion resulting from §§2036(a), 2041, 2042(2) and 2044, but not estate taxes arising from properties included by virtue of other code sections that necessitate inclusion of non-probate properties in the federal gross estate. The only explanation, albeit unsatisfactory, for the selective recovery is the ad hoc manner in which these four code sections were enacted.[19]

As explained *infra* in Part II(C), §2206 was enacted in 1918, only two years after the original enactment of the federal estate tax. The Revenue Act of 1916 included both probate and non-probate properties (transfers in contemplation of death and joint properties) in the federal gross estate.[20] In 1918, Congress expanded the definition of the gross estate to include dower interests, life insurance on the decedent's life, and exercised general powers of appointments.[21]

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[17] *See* cases cited *supra* note 15.
[18] Branch Banking and Trust Co. v. Staples, 120 N.C. App. 227, 461 S.E.2d 921 (1995); Cleveland v. Compass Bank, 652 So.2d 1134 (Ala. 1994); In Matter of Estate of Gordon, 134 Misc.2d 247, 510 N.Y.S.2d 815 (1986); Maurice F. Jones Trust v. Barnett Banks Trust Co., 637 N.E.2d 1301 (Ind. App. 1994); Estate of Kramer, 203 A.D.2d 78, 610 N.Y.S.2d 31 (1994); and Estate of Miller, 230 Ill. App.3d 141, 595 N.E.2d 630 (Ill. App. 1992).
[19] *See infra* Part II.
[20] *See infra* Part II(B)(2).
[21] *See infra* Part II(C).

The legislative history fails to provide any reason why the executor was given a right to recover estate taxes from the beneficiaries of life insurance yet did not give the executor that same right to recover from beneficiaries of an exercised general power of appointment or from the surviving spouse for dower interests.[22] Arguably, the decedent could have exercised the general power of appointment by appointing a portion of the general power of appointment property to the decedent's estate had the decedent wanted the general power of appointment property to bear a portion of the estate tax. On the other hand, the decedent could have named his or her estate as beneficiary of a portion of the life insurance. There isn't any logical explanation for granting a right of recovery for estate taxes arising with respect to life insurance but not granting a right of recovery for estate taxes arising with respect to an exercised general power of appointment. In the same vein, why didn't Congress also address a right of recovery for estate taxes arising with respect to dower interests and joint properties which were also includible in the federal gross estate?[23]

In 1942, Congress did extend the right of recovery to powers of appointment.[24] By then, Congress had expanded the definition of the gross estate to include revocable transfers (now §2038)[25] and retained life estates (now §2036).[26] Congress gave no explanation why it was extending the right of recovery only to powers of appointment.[27]

In 1981, Congress enacted the unlimited marital deduction and qualified terminable interest property.[28] The legislative history clearly establishes that Congress wanted the QTIP to pay the additional estate taxes arising due to its inclusion in the surviving spouse's federal gross estate. [29] Congress did not consider recovery for any of the other inclusionary sections.[30]

In 1987, Congress enacted §2036(c) to include in the federal gross estate transfers that qualified as an asset freeze.[31] In 1988, Congress amended §2036(c) and granted the decedent's estate a right to recover a pro rata portion of the estate taxes from retained life estates that are included in the gross estate.[32] Apparently, this recovery provision was added because of the expansion of the definition of the gross estate to include transfers considered as part of an asset freeze, but §2207B was not so limited.[33] Section 2036(c) was repealed in 1990, but §2207B was

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[22] *Id.*
[23] As noted *infra* at note 76, the marital deduction was not enacted until 1948; thus a dower interest would have generated estate taxes.
[24] *See infra* Part II(G).
[25] *See infra* Part II(D).
[26] *See infra* Part II(F).
[27] *See infra* Part II(G).
[28] *See infra* Part II(J).
[29] *Id.*
[30] *Id.*
[31] *See infra* Part Part II(K).
[32] *Id.*
[33] *Id.*

retained.[34] Inexplicably, Congress felt §2207B should remain even though the decedent's estate had never had the right of recovery during the 56 years between 1932 (the year the gross estate was expanded to include retained life estates) and 1988.[35]

The tax recovery provisions, enacted over a seventy-two year period, lack any indication that Congress has made a systematic examination of the need or the scope of recovery. If an executor needs a federal right to recover from recipients of non-probate properties included in the federal gross estate, then such recovery should be permitted for all of the estate tax inclusionary provisions, not just some.

3. Executor v. Decedent's Estate

Sections 2206 and 2207 grant the right to recover estate taxes to the executor. Sections 2207A and 2207B grant the right to recover to the decedent's estate. The term "executor" is defined as "the executor or administrator of the decedent, or, if there is no executor or administrator appointed, qualified, and acting within the United States, then any person in actual or constructive possession of any property of the decedent."[36] The term "decedent's estate" is not defined in the Code. Presumably, the term "decedent's estate" would include the executor but may be more comprehensive. If so, it should be defined. A consistent term should be used in all four code sections to avoid confusion.

4. Expansion of Recovery Right Beyond Executor and Decedent's Estate

As explored *supra* in Part I (B) (3), without a definition of "decedent's estate," it is not clear whether the term in §§2207A and 2207B includes individuals other than the executor. Regardless, why limit the right of recovery to executors and decedent's estates? Many times an executor is appointed when most of the decedent's assets are in a revocable trust. The trustee may issue the check to the Internal Revenue Service. In such event, because there is an appointed executor, the trustee of the revocable trust is not considered the executor under §2203 and thus cannot pursue recovery.[37] In this scenario, the executor hasn't paid the tax, so the executor cannot pursue a recovery. If a federal right of recovery is given, there is no reason to limit it merely to the executor and the decedent's estate; rather it should be extended to any individual paying the estate taxes apportioned to another.

5. Direction by Instrument

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[34] *Id.*
[35] *Id.*
[36] Section 2203.
[37] The trustee can however proceed under state laws. *See* the numerous cases referenced in Maurice T. Brunner, Annotation, *Ultimate Burden of Estate Tax in Absence of Statute, Will, or Other Provision*, 68 A.L.R.3D 714 (1976) and Maurice T. Brunner, Annotation, *Construction and Application of Statutes Apportioning or Prorating Estate Taxes*, 71 A.L.R.3D 247 (1976).

Sections 2206 and 2207 permit a decedent to direct "otherwise by his will." Sections 2207A and 2207B permit a decedent to direct otherwise "in his will (or a revocable trust)." These code sections should be consistent. The decedent should be able to use a revocable trust to direct otherwise with respect to life insurance and general powers of appointment. In fact, there doesn't appear any reason to limit the decedent's ability to waive reimbursement solely to a direction contained in a will or revocable trust. Section 3 of the Uniform Estate Tax Apportionment Act (2003) permits a decedent to direct by will, revocable trust and any other dispositive instrument.[38]

6. Standard to Direct Otherwise

Sections 2206 and 2207 provide the right of recovery exists "unless the decedent directs otherwise." Sections 2207A and 2207B provide the right of recovery shall not apply to the extent that the decedent in his will (or revocable trust) "specifically indicates" an intent to waive any right of recovery.[39] The standard set forth in §§2207A and 2207B is more stringent than that set forth in §§2206 and 2207. This inconsistency could lead to a court finding that the decedent met the standard in §§2206 and 2207 but not the standard in §§2207A and 2207B.[40] There isn't any justification for two different standards. If Congress wishes to retain the tax recovery provisions, Congress should apply one standard and apply it to all four code sections.

7. Controlling Instrument

Sections 2207A and 2207B permit the decedent to direct in his will or revocable trust. Since the conjunction "or" is used, what happens if the decedent's will contains one direction but the decedent's revocable trust contains a different direction? These codes sections do not address which document would control in such an event. Since Congress has not spoken, should state law determine which document controls or should there be a federal statute which controls?[41]

These code sections permit a decedent to direct against the right of recovery but do not specifically permit a decedent to impose the tax on another entity. For example, can the decedent's will impose all of the estate taxes upon the decedent's revocable trust? Should federal law speak to this issue?[42]

8. Penalties and Interest

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[38] Uniform Estate Tax Apportionment Act (2003).
[39] *See infra* Part II(L) wherein the amendments to §§2207A and 2207B by the Tax Reform Act of 1997 are discussed.
[40] Section 3 of The Uniform Estate Tax Apportionment Act (2003) provides the statute applies except to the extent that the will, revocable trust or other dispositive instrument "expressly and unambiguously" directs the apportionment of an estate tax.
[41] Section 3 of The Uniform Estate Tax Apportionment Act (2003) provides the will controls over other instruments.
[42] *See* Section 3 of The Uniform Estate Tax Apportionment Act (2003) which addresses this issue in part.

Sections 2207A(d) and 2207B(c) permit the executor to recover penalties and interest along with estate taxes. Sections 2206 and 2207 do not contain a similar provision. Consistency is warranted. The right to recover penalties and interest should not be permitted if the party seeking recovery caused the penalties and interest to arise. For example, if the executor through the executor's own negligence fails to timely file the estate tax return giving rise to late filing penalties, the executor should not be able to recover all or a portion of those penalties from recipients of non-probate properties.

9. Marital Deduction

The last sentence of both §§2206 and 2207 addresses the recovery of estate taxes from the surviving spouse. The sentence was inserted prior to the unlimited marital deduction and has outlived its usefulness. It can be eliminated from both code sections.

10. Tax Calculation Issues

Section 2207A requires QTIP property included in the surviving spouse's gross estate pursuant to §2044 to bear the additional estate taxes caused by its inclusion. Sections 2206, 2207 and 2207B apply an average rate. Section 2206 provides that the life insurance beneficiary is to bear "such portion of the total tax paid as the proceeds of such policies bear to the taxable estate." Section 2207 provides that powers of appointment bear "such portion of the total tax paid as the value of such property bears to the taxable estate." Section 2207B contains a standard similar to section 2207. In §§2206, 2207 and 2207B, a fraction is multiplied by the "total tax." However, if the decedent's federal gross estate includes QTIP property and life insurance, powers of appointment or a retained life estate, the equation in §§2206, 2207 and 2207B generates too much recovery. The "total tax" in §§2206, 2207 and 2207B should first be reduced by the additional estate taxes arising from the QTIP's inclusion so that only the remaining tax is shared by these other properties and the probate estate.

Section 2206 provides that the numerator of the fraction is the proceeds of the life insurance policies. Sections 2207 and 2207B reference the "value of the property." The denominator in all three code sections is the "taxable estate." Since the taxable estate is determined by reducing the value of the assets in the gross estate by deductions, presumably the "value of the property" for purposes of §§2207 and 2207B should be the gross value of the items less the amount of deductions taken on the estate tax return paid by or allocated to such property; however, these code sections do not explicitly provide the same and imply that the numerator is the gross value. Any deductions paid or allocated to life insurance should also reduce the "proceeds" for purposes of the computation.

None of the code sections allow the properties covered by these code sections to benefit from the credits allowed under §§2013 – prior tax credit, 2014- foreign tax credit, and 2015 – remainder interests. For example, assume a prior tax credit is permitted because a retained life

estate included in the federal gross estate was previously taxed, should the retained life estate be credited with the prior tax credit?[43]

11. Inside Apportionment

Sections 2206, 2207, 2207A and 2207B govern the apportionment of estate taxes between entities. In other words, what portion of the estate taxes should be charged to the QTIP trust? The statutes do not attempt to apportion estate taxes inside the entity. For example, in the *Matter of Probate of Will of Samuel Lee*,[44] the surviving spouse died with a QTIP trust included in her federal gross estate. The QTIP Trust directed $165,000 be distributed outright to the grantor's daughter, directed $600,000 in trust for the same daughter, and left the balance of the QTIP Trust to two charities. The parties agreed that §2207A required that the QTIP trust bear the additional estate taxes caused by its inclusion in the surviving spouse's federal gross estate, but disagreed over who inside the QTIP would bear the tax.[45] The court held that §2207A preempts state law as to the federal estate tax. But, state law determined apportionment inside the QTIP trust. Should federal law address inside apportionment?

12. Summary

As illustrated in this Part, §§2206, 2207, 2207A and 2207B contain numerous inconsistencies and internal issues. To address the many inconsistencies set forth in this Part, a comprehensive federal tax apportionment statue may be warranted which would address many if not most of the issues set forth in a comprehensive estate tax apportionment act. While some have advocated for a comprehensive federal tax apportionment act,[46] we present three competing arguments in Part V, to wit, (1) enact a comprehensive federal tax apportionment act, (2) amend the current tax recovery provisions to eliminate the inconsistencies, or (3) entirely repeal the tax recovery provisions in their entirety.

PART II. HISTORICAL DEVELOPMENT

A. Death Taxes in the United States Pre-1916

Prior to 1916, the colonies, the states and the federal government had at various times imposed several types of death taxes.[47] Possibly the first instance of a death tax arose in 1687

[43] Section 5 of The Uniform Estate Tax Apportionment Act (2003) is solely devoted to the apportionment of credits and deferrals.
[44] 910 A.2d 634 (N.J. App. 2006).
[45] Of course, the amount of the additional estate taxes also depended on how much, if any, of the additional estate taxes would be borne by the two charities.
[46] *See infra* Part IV.
[47] The authors use the term "death taxes" to encompass all taxes arising at the decedent's death such as probate duties, legacy taxes, succession taxes, inheritance taxes, and estate taxes. The term does not include income taxes.

when the Governor of the Virginia colony imposed a duty on impressing his seal on the issuance of letters of administration.[48] In 1694, England enacted the Stamp Act of 1694 that imposed a tax on the probates of wills and issuances of letters of administration.[49] These two taxes are "probate duties" which are treated as an expense of administration to be deducted out of the residue of the estate.[50] Probate duties are a stamp tax on the interest which ceased by reason of a person's death.[51]

In 1797, the newly formed U.S. federal government enacted a stamp tax on any receipt or other discharge on account of any legacy of personalty left by will or other testamentary instrument.[52] The highest bracket was one dollar on each $5,000 discharged.[53] This tax is referred to as "legacy tax" and is charged upon legacies, not upon the residue of the estate.[54] The rate of tax depends on the amount of the legacy.[55] Legacy taxes impose a tax on the receipt of property.[56]

In its legislative session of 1825-26, Pennsylvania was the first state to enact a real inheritance tax. [57] Similar to a legacy tax, an inheritance tax imposes a tax upon the right to receive property, but differs from a legacy tax in that generally the imposition of tax and the rate of tax are dependent on the relationship of the recipient to that of the decedent.[58] Like a legacy tax, an inheritance tax is determined by the amount of the property passing to the recipient and is charged to the recipient rather than to the general estate.[59] Since legacy and inheritance taxes are imposed on the recipients, the taxes are apportioned by their very nature.

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[48] William J. Shultz, THE TAXATION OF INHERITANCE (1926) at 98. *See* also Max West, THE INHERITANCE TAX, 2nd ed. (1908) at 104.
[49] West, *supra* note 48, at 60.
[50] Knowlton v. Moore, 178 U.S. 41 at 48, 20 S.Ct. 747 at 750 (1900).
[51] *Id*. 178 U.S. at 49, 20 S.Ct. at 751.
[52] An Act Laying Duties on Stamped Vellum, Parchment, and Paper, ch. 11, 1 Stat. 527. The tax was repealed by An Act to Repeal the Internal Revenue Taxes, §1, 2 Stat 148. Detailed discussions concerning legacy taxes are set forth in Knowlton, 178 U.S. 41 at 50, 20 S.Ct. 747 at 751; Shultz, *supra* note 48at 150, and West, *supra* note 48 at 87-89.
[53] Knowlton, 178 U.S. at 50, 20 S.Ct. at 751.
[54] *Id.* 178 U.S. at 48-50, 20 S.Ct. at 750-751.
[55] The Stamp Act of July 6, 1797, 1 Stat. 527, ch. 11, §1.
[56] Knowlton, 178 U.S. at 48, 20 S.Ct. at 750.
[57] Shultz, *supra* note 48 at 98 and West, *supra* note 48at 97.
[58] Arthur W. Blakemore and Hugh Bancroft, THE INHERITANCE TAX LAW (1912) at 7.
[59] Pennell, *supra* note 10 at III(D)(2).

In 1862, Congress re-enacted a probate duty and a legacy tax.[60] The probate duty's highest rate was $10 per $50,000.[61] In 1864, Congress expanded taxation to impose a duty on the passing of real property.[62] This latter tax is known as a "succession tax" and is a tax placed on the gratuitous acquisition of property which passes on the death of any person.[63] The tax is charged against each interest in real property.[64] Similar to legacy and inheritance taxes, the succession tax has inherent apportionment.

In 1898, Congress re-enacted a legacy tax which combined some of the components of an inheritance tax and a probate duty.[65] The tax was imposed on the inherited property at a rate dependent on the relationship of the recipient to the decedent and at a rate dependent on the size of the decedent's estate.[66] When, the constitutionality of the Act was questioned, the Supreme Court upheld the imposition of the tax but struck that portion of the Act which set a rate dependent on the size of the decedent' estate.[67] The balance of the Act was repealed in 1902.[68]

By 1916, the colonies, the states and the federal government had imposed from time to time a probate duty, a legacy tax, an inheritance tax, and a succession tax. The latter three taxes were charged to and borne by the inherited property. The probate duty was charged to the general estate and borne by the residue of the estate. At the end of 1915, only the inheritance tax remained in force in forty-three of the forty-eight states.[69]

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[60] An Act to Provide Internal Revenue to Support the Government and to Pay Interest on the Public Debt, §110, 12 Stat. 432, 483 (1862). The Stamp Act of July 6, 1797, 1 Stat. 527, ch. 11, §1 had expired. The 1862 Act was amended by An Act to Provide Internal Revenue to Support of the Government, to Pay Interest on the Public Debt, and for Other Purposes, §126, 13 Stat. 223, 285-91 (1864) and again in 1866 (14 Stat. at L. 140, chap. 140) and repealed by An Act to Reduce Internal Taxes, and for Other Purposes, §1, 16 Stat. 256 (1870) and by An Act to Reduce Duties on Imports, and to Reduce Internal Taxes, and for Other Purposes, §36, 17 Stat. 231 (1872). See Shultz, *supra* note 48at 152 and West, *supra* note 48 at 90.

[61] An Act to Provide Internal Revenue to Support the Government and to Pay Interest on the Public Debt, §94, 12 Stat. 432, 485 (1862).

[62]An Act to Provide Internal Revenue to Support of the Government, to Pay Interest on the Public Debt, and for Other Purposes, §126, 13 Stat. 223, 285-91 (1864). *See* also Shultz, *supra* note 48 at 152 and Knowlton, 178 U.S. at 51, 20 S.Ct. at 751.

[63] Knowlton, 178 U.S. at 48, 20 S.Ct. at 750.

[64] *Id*. at 178 U.S. at 51, 20 S.Ct. at 751.

[65] An Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes, §29, 30 Stat. 448, 464-65 (1898), amended 31 Stat. 946 (1901). For a detailed analysis, see West, *supra* note 48 at 94. The prior tax act had expired.

[66] *Id.*

[67] Knowlton, 178 U.S. 41, 20 S.Ct. 747.

[68]An Act to Repeal War-Revenue Taxation, and for Other Purposes, Pub. L. No. 57-67, ch. 500, 32 Stat. 96 (1902). *See* Shultz, *supra* note 48 at 155.

[69] Hugh Bancroft, INHERITANCE TAXES FOR INVESTORS (1917), at 5. *See* West, *supra* note 48 for a detailed analysis of the historical enactment and a summary of the inheritance tax in each state.

B. Estate Taxes in 1916

1. Rhode Island

Rhode Island became the first state to enact an estate tax.[70] The tax was a modest tax of ½ of one percent on the net estate.[71] The net estate was determined by subtracting from the value of the decedent's property all legal claims, funeral expenses, probate charges, widow and children support allowances and fees of appraisers, executors and trustees.[72]

2. The Revenue Act of 1916

The Revenue Act of 1916 initiated the first federal estate tax.[73] A graduated estate tax was imposed upon the net estate of a decedent with the highest rate of 10% being imposed on net estates exceeding $5,000,000.[74] The net estate was determined by reducing from the gross estate funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the estate administration period which were not compensated for by insurance, support payments paid to dependents, such other charges allowed by the laws of the jurisdiction under which the estate is being administered, and an exemption of $50,000.[75] Note the absence of the marital and charitable deductions.[76]

The gross estate consisted of the following:

(a). property subject to administration (hereinafter "Probate Property");
(b). transfers "in contemplation of or intended to take effect in possession or enjoyment at or after his death;"[77] and
(c). jointly held properties (including tenants in the entirety).

Note, the gross estate consisted of probate and non-probate properties.

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[70] Inheritance Tax Act of 1916, P.L. Chpt. 1339, approved February 22, 1916. *See* Hugh Bancroft, *supra* note 69 at 96, f.n. 1 wherein Bancroft notes the Rhode Island estate tax was the only precedent in the United States for the Revenue Act of 1916 enacted by the U.S. Congress.
[71] *Id.*, §1.
[72] Id., §2.
[73] An Act to Increase the Revenue, and for Other Purposes, Pub. L. No. 64-271, §1, 39 Stat. 756 (1916).
[74] *Id.*, §201 of Pub. L. No. 271.
[75] *Id.*, §203(a)(1) & (2) of Pub. L. No. 271.
[76] The charitable deduction was introduced in the Revenue Act of 1918, Pub. L. No. 254, 40 Stat. 1057, Feb. 24, 1919. The marital deduction was introduced in the Revenue Act of 1948, Pub. L. No. 471, 62 Stat. 110, April 2, 1948.
[77] The phrase "intended to take effect in possession or enjoyment at or after his death" would give rise to significant litigation. *See* Note, *Estate Taxation of Irrevocable Trusts Wherein Settlor Retains An Interest,* 43 YALE L. J. 191 (1934). The phrase is traced to a Pennsylvania statute enacted in 1826. *See* Note, *Origin of the Phrase, 'Intended To Take Effect In Possession Or Enjoyment At Or After Death' (Section 811(C)), Internal Revenue Code*, 56 YALE L. J. 176 (1946).

The Act imposed upon the executor[78] the duty to pay the tax.[79] If the tax was not paid within sixty days of its due date, the government could commence court proceedings in any court to collect the tax.[80] The law provided:

> "If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."[81]

This language now appears essentially unaltered in §2205 of the Internal Revenue Code of 1986, as amended.[82] Notably, the right to recover is granted to any person, other than the executor, who pays tax on behalf of another:[83] the statute does not grant the executor a right of recovery.[84]

The statute expresses Congressional intent that the tax be paid out of the probate estate by the executor before its distribution. It provides that the person who paid the tax may recover tax from "the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for payment of taxes." The statute does not provide which person or interest "would have been reduced" by the payment of the tax. Arguably, the statute apportions all of the tax to the residuary estate since the executor must bear the tax. This argument was successfully made in 1919 in *In Re Hamlin*.[85] The court concluded that Congress required the executor to pay the tax from the residuary estate and noted:

> As to the equity of requiring payment of the tax by the residuary legatees and relieving the remaining legatees from any contribution to the same the question is susceptible of

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[78] The term "executor" was defined in Sec. 200 of Pub. L. No. 271 as "the executor or administrator of the decedent, or, if there is no executor or administrator, any person who takes possession of any property of the decedent."
[79] *Id.*, §207.
[80] *Id.*, §208, first sentence.
[81] *Id.*, §208, third sentence.
[82] The only change is that of the comma after the phrase "possession of" being advanced to after the term "collected out of."
[83] Litman, *supra* note 9 at 358.
[84] *Id.*
[85] 226 N.Y. 407, 124 N.E. 4 (1919), *cert . denied sub non.* Hamlin v. Wellington, 250 U.S. 672 (1919). See Gail D. Potysman, *Federal Estate Tax Apportionment*, 54 CHI.-KENT. L. REV. 943 (1978) for a detailed discussion of the case and its impact on the development of tax apportionment law.

> conflict of opinion. The Congress has spoken and it is our function to interpret, not to legislate.[86]

The equivocal holding in *Hamlin* was followed by numerous state courts and has established the common law that the federal estate tax is charged to the residuary estate.[87] Twenty-three years later, the U.S. Supreme Court in *Riggs v. Del Drago* disagreed and held federal law did not apportion the federal estate tax.[88] Therein, a pre-residuary beneficiary argued that federal law preempted New York's estate tax apportionment statute.[89] The New York statute apportioned the estate tax to all beneficiaries of the estate, including pre-residuary devises. The pre-residuary beneficiaries argued that New York's estate tax apportionment statute was unconstitutional in that federal law required that the estate tax be paid by the residue of the estate. The Supreme Court stated:

> We are of opinion that Congress intended that the federal estate tax should be paid out of the estate as a whole and that the applicable state law as to the devolution of property at death should govern the distribution of the remainder and the ultimate impact of the federal tax…. It did not undertake in any manner to specify who was to bear the burden of the tax. Its legislative history indicates clearly that Congress did not contemplate that the Government would be interested in the distribution of the net estate after the tax was paid, and that Congress intended that state law should determine the ultimate thrust of the tax.[90]

The Court references the following comment by Congressman Cordell Hull, one of the supporters of the 1916 Act and its reputed draftsman:

> Under the general laws of descent the proposed estate tax would be first taken out of the net estate before distribution, and distribution made under the same rule that would otherwise govern it. Where the decedent makes a will he can allow the estate tax to fasten on his net estate in the same manner, or if he objects to this equitable method of

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[86] In re Hamlin, at 420.

[87] *See* Note, *Constitutionality of State Law Apportioning Incidence of Federal Estate Tax*, 51 YALE L. J. 1202, 1203 (1942) . *See* also Note, *Taxation—Equitable Apportionment of Federal Estate Tax on Non-Probate Property, Carpenter v. Carpenter, 267 S.W.2d 632 (Mo. 1954)*, 1955 WASH. U. L. Q. 89, 91 (1955), wherein the author notes that the courts had initially burdened the residue with all of the estate taxes on the assumption that federal law required the same and even after *Riggs v. Del Drago*, 317 U.S. 95, 63 S.Ct. 109 (1942) the courts continued to do so.

[88] 317 U.S. 95, 63 S. Ct. 109 (1942). *See* footnotes 7 and 8 of the opinion for a list of the court cases in which the courts analyzed whether the Revenue Act of 1916 was meant to preempt state law as to tax apportionment. *See* also Note, *Constitutionality of State Law Apportioning Incidence of Federal Estate Tax*, 51 YALE L. J. 1202 (1942).

[89] Chapter 709, Laws of 1930, New York. This statute was the first estate tax apportionment statute. *See* Maurice T. Brunner, Annotation, *Construction and Application of Statutes Apportioning or Prorating Estate Taxes*, 71 A.L.R.3d 247, §2[a].

[90] Riggs, 317 U.S. at 97, 63 S. Ct. at 110.

> imposing it upon the entire net estate before distribution he can insert a residuary clause or other provision in his will, the effect of which would more or less change the incidence of the tax.[91]

The Supreme Court concluded that the statute, now §2205, does not preempt state law.[92]

In 1916, none of the states had tax apportionment statutes.[93] Forty-three states had inheritance taxes.[94] By its nature, the inheritance tax was apportioned to the inherited property and did not need a body of common law or a federal tax apportionment statute.[95] An estate tax, however, is imposed upon the estate as a whole.[96] Only Rhode Island had an estate tax and its statute did not contain an apportionment provision.[97] Prior to 1916, the only death tax which had been charged to the general estate was the probate duty.[98] Probate duties were always quite de minims in amount.[99] In 1916, there was no common law apportioning estate taxes.[100] In fact, the first published decision apportioning estate tax was issued by the New Hampshire Supreme Court in 1918.[101] Therein the court held the federal estate tax should be equitably apportioned to both pre-residuary and residual devises.[102] A year later, the New York Court of Appeals *In Re Hamlin* would apportion all of the federal estate tax to the residue, relieving the pre-residual

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[91] The quotation appears in footnote 4 of Riggs, 317 U.S. at 98, 63 S. Ct. at 111. Presumably, the Congressman was referencing probate duties when referring to the estate tax being "taken out of the net estate before distribution" since probate duties were the only death taxes that had been paid out of the general estate at the time of the Congressman's comments. *See* discussion *supra* at Part II(A).

[92] The Supreme Court in Riggs, 317 U.S. at 99, 63 S. Ct. at 111 notes that the Treasury has consistently held that Congress is only concerned with the collection of the tax not the apportionment thereof. *See* body of opinion at footnote 6 and the references contained in footnote 6.

[93] Eugene F. Scoles, *Apportionment of Federal Estate Taxes and Conflict of Laws*, 55 COLUM. L. REV. 261, 262 (1955).

[94] *See* Bancroft, *supra* note 69 at 5.

[95] Pennell, *supra* note 10 at III(D)(2).

[96] *Riggs*:

> We are of the opinion that Congress intended that the federal estate tax should be paid out of the estate as a whole…" 317 U.S. at 97, 63 S.Ct. at 110.

[97] *See supra* Part II(B)(1).

[98] *See supra* Part II(A).

[99] Jeffrey A. Cooper, *Interstate Competition and State Death Taxes: A Modern Crisis in Historical Perspective*, 33 PEPPERDINE L. REV. 835, 844 (2006).

[100] *See* Shultz at 24-25, *supra*, note 48 .

[101] Fuller v. Gale, 78 N.H. 544, 103 A. 308 (N.H. 1918). *See* Donald Glasberg, *Federal Estate Tax Apportionment*, 16 DEPAUL L. REV. 112, 115 (1966) noting this decision as being the first tax apportionment case. For a detailed discussion of the case law which developed throughout the U.S. *see* Maurice T. Brunner, Annotation, *Ultimate Burden of Estate Tax in Absence of Statute, Will, or Other Provision*, 68 A.L.R.3d 714 (1976).

[102] Fuller v. Gale. The New Hampshire Supreme Court would reverse itself in Amoskeag Trust Co. v. Trustees of Dartmouth College, 89 N.H. 471, 200 A. 786 (1938) burdening the residue with all of the estate taxes.

bequests from any share of the estate taxes.[103] The Court asserted that Congress intentionally placed the tax on the residue.[104] The New York court's approach, commonly referred to as "burden the residue" with all of the estate taxes, would be followed by nearly every court for twenty-three years.[105] The U.S. Supreme Court in *Riggs v. Del Drago* rejected the position that Congress intended to apportion the estate taxes to the residue.[106] By 1942, however, the "burden the residue" common law was so entrenched that courts continued to follow it even though it was based on a premise expressly rejected by the Supreme Court. [107]

C. Revenue Act of 1918

In 1918, Congress expanded the definition of the gross estate to include (1) dower, courtesy, and any estate created in lieu of dower or courtesy, (2) general powers of appointment that were exercised by the decedent and (3) life insurance on the decedent's life to the extent of the excess over $40,000.[108] Deductions were expanded to include property passing to charities.[109]

The tax recovery provision (now §2205) set forth in §208 of the Revenue Act of 1916 was renumbered as §408 in the Revenue Act of 1918 but otherwise unaltered.[110] The Revenue Act of 1918 expanded tax recovery to life insurance by inclusion of the following paragraph:

> If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.[111]

The House Ways and Means Committee analyzed the expanded definition of the gross estate and noted:

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[103] In Re. Matter of Hamlin, *supra* note 85. In 1930, New York would statutory reverse this decision by enacting a tax apportionment statute which would equitably apportion estate taxes to all property included in the estate including pre-residuary devises. Laws of 1930, chpt. 709.
[104] In Re. Matter of Hamlin, *supra* note 85 at 413. *See* also Note, *Constitutionality of State Law Apportioning Incidence of Federal Estate Tax*, 51 YALE L. J. 1202 at 1203 (1942).
[105] *See* Note, *Proposal for Apportionment of the Federal Estate Tax*, 30 INDIANA L. J. 217, 222 (1955); Note, *Constitutionality of State Law Apportioning Incidence of Federal Estate Tax*, 51 YALE L. J. 1202 (1942); and Note, *Statutory Apportionment of Federal Estate Taxes*, 63 HARV. L. REV. 1022 (1949).
[106] 317 U.S. 95, 63 S. Ct. 109 (1942)
[107] Note, *Taxation-Equitable Apportionment of Federal Estate Tax on Non-Probate Property, Carpenter v. Carpenter, 267 S.W.2d 632 (Mo. 1954)*, 1955 WASH. U.L.Q. 89, 91 (1955).
[108] Revenue Act of 1918, Pub. L. No. 245, 40 Stat. 1057, February 24, 1919, §402.
[109] *Id.* at §403(a)(3).
[110] *Id.* at §408, second paragraph.
[111] *Id.* at §408, third paragraph.

> Minor changes in verbiage and slight modifications in procedure have been made for the sake of insuring more equitable, uniform, and efficient administration of the law. Instance of these are … the giving to the executor a right of contribution from the specific beneficiary under policies of insurance.[112]

The legislative history provides no insight why the executor was given this particular limited right of recovery yet no other right of recovery. There is no explanation why the executor's recovery right was not extended to estate taxes arising on other non-probate property, such as dower and courtesy interests, transfers in contemplation of death, transfers intended to take effect in possession or enjoyment at or after the decedent's death, joint property, or exercised general powers of appointment.[113]

In 1918, only Rhode Island had an estate tax.[114] Rhode Island's statute did not apportion the estate tax. The one published decision which considered the apportionment of estate taxes concerned apportionment between pre-residuary and residuary devises rather than apportionment of estate taxes outside of probate.[115] In 1918, forty-four states had inheritance taxes.[116] In the absence of any law apportioning estate taxes among probate and non-probate property, Congress may have considered it advisable to enact a provision permitting the executor to recover estate taxes from beneficiaries of life insurance. Assuming this presumed intent, it is illogical that Congress would not have granted the executor a similar right to recover from recipients of other non-probate property, or at least explain why recovery was limited only to recipients of life insurance proceeds.

The newly enacted recovery right granted to the executor with respect to estate taxes on life insurance (hereinafter "§2206 Predecessor Provision") differs from the recovery provision originally enacted in the Revenue Act of 1916 and renumbered in the Revenue Act of 1918 (hereinafter the "§2205 Predecessor Provision"). The §2206 Predecessor Provision is granted to the executor while the §2205 Predecessor Provision is granted to any person other than the executor. Presumably, a beneficiary of a life insurance policy could utilize the §2205 Predecessor Provision should the beneficiary pay more than a pro rata portion of the estate taxes

Treasury Regulations issued February 24, 1919 state:

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[112] HOUSE REPORT 767, SIXTY-FIFTH CONGRESS, SECOND SESSION, SEPTEMBER 3, 1918, HOUSE WAYS AND MEANS COMMITTEE, 1939-1 C.B. (PART 2) 86.

[113] Revenue Act of 1918, Pub. L. No. 245, 40 Stat. 1057, February 24, 1919, §402. Note, the Revenue Act of 1918 permitted a deduction for property passing to charity but a deduction was not permitted for property passing to a surviving spouse. Thus, dower and courtesy interests would give rise to estate tax even though they pass to a surviving spouse.

[114] *See supra* Part II(B)(1).

[115] *See* Fuller, *supra* note 101.

[116] *See* Bancroft at p. 5, *supra* note 69 wherein Bancroft lists the forty-three states which had an inheritance tax in 1917. In 1918, Mississippi enacted its first inheritance tax (Ch. 109, L. 1918) bringing the number of taxes with inheritance taxes to forty-four by the end of 1918. [116] *See* also Commerce Clearing House, INHERITANCE AND TRANSFER TAX (1926) wherein a review of the death taxes imposed by each state and territory are set forth.

> The executor is also entitled to require beneficiaries under insurance policies to bear their proportion of the tax. These provisions, however, are not designed to curtail the right of the Bureau to collect the tax from any person, or out of any property, liable therefor. The Bureau may not be required to apportion the tax among the persons liable. For example, where a transfer has been made in contemplation of death, the Bureau may hold both the executor and the transferee liable with respect to the tax upon the the property transferred. In such case, if the tax is paid by the executor, he may not look to the Bureau for relief by refund of part of the tax.[117]

D. Revenue Act of 1924

The Revenue Act of 1924[118] expanded the definition of gross estate to include transfers where the decedent reserved the right to alter, amend, or revoke the transfer (the predecessor to current §2038).[119] The §§2205 and 2206 Predecessor Provisions were renumbered but otherwise unaltered.[120] Even though the 1924 Act expanded the gross estate to include additional non-probate property, Congress did not expand tax recovery.

The Revenue Act of 1924 also enacted a credit for any estate, inheritance, legacy or succession taxes paid to any state or territory or the District of Columbia paid to the extent of 25% of the imposed federal estate tax.[121] At the time, forty-four of the forty-eight states and the territory of Hawaii had an inheritance tax. [122] Rhode Island was the one state with both an inheritance and an estate tax.[123]

In response to the revenue sharing permitted by the Revenue Act of 1924, Mississippi enacted an estate tax in 1924.[124] Georgia and New York followed suit in 1925.[125]

E. Revenue Act of 1926

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[117] U.S. Office on Internal Regulations 37 (Revised 1919) relating to estate tax under the Revenue Act of 1918 (approved Feb. 24, 1919), Art. 98.
[118] Pub. L. No. 68-176, 43 Stat. 253, Chpt. 234, June 2, 1924
[119] *Id.* at §302(d).
[120] *Id.* at §314(b).
[121] *Id.* at §301(b).
[122] *See supra* note 116.
[123] Bancroft, *supra* note 69 at 2251.
[124] Estate Tax Act of 1924, Chap. 134.
[125] *See* Commerce Clearing House, *supra* note 116, summaries for Georgia at p. 601 and New York at p. 1651.

In the Revenue Act of 1926, Congress increased the state death tax credit to 80%.[126] Even though credit was permitted for inheritance taxes paid, states rushed to enact estate taxes in order to ensure that the state would receive the full benefit of the 80% credit given.[127] By 1938, forty states had enacted estate taxes.[128] In 1938, forty-seven of the forty-eight states had either an inheritance or estate tax, or both.[129]

F. Revenue Act of 1932

The Revenue Act of 1932 expanded the definition of gross estate to include transfers in which the decedent retained an income interest or the right to designate the person who possesses or enjoys the property (the predecessor to current §2036).[130] There is no indication that Congress contemplated expansion of the tax recover provisions to permit the executor to recovery estate taxes attributable to retained life interests.

G. Revenue Act of 1942

The Revenue Act of 1942 substantially revised the taxation of powers of appointment.[131] The Act included in the gross estate general powers of appointment regardless of whether the power was in fact exercised and also included in the gross estate certain limited powers of appointment regardless of whether the limited power was exercised.[132] The Act also granted the executor a power to recover estate taxes imposed on powers of appointment included in the gross estate (hereinafter "§2207 Predecessor Provision").[133] The provision read as follows:

> (d) LIABILITY OF RECIPIENT OF PROPERTY OVER WHICH DECEDENT HAD POWER OF APPOINTMENT.-
>
> > Unless the decedent directs otherwise in his Will, if any part of the gross estate upon which the tax has been paid consists of the value of property included in the gross estate under section 811(f), the executor shall be entitled to recover from the person receiving such property by reason of the exercise, nonexercise, or release of a power of appointment such portion of the total tax paid as the value of such property bears to the sum of the net estate and the amount of the exemption allowed in computing the net estate, determined under section 935 (c), or section

[126] Revenue Act of 1926, 44 Stat. 9, Pub. L. No. 20, February 26, 1926, §300(b).
[127] Robert H. Holley, DIGEST OF STATE LAWS RELATING TO INHERITANCE AND ESTATE TAXES, U.S. Government Printing Office (1938), at 6.
[128] *Id.*
[129] *Id.* at 1 and 6. Nevada was the only state without an inheritance or estate tax.
[130] Revenue Act of 1932, 47 Stat. 169, §803.
[131] Pub. L. No. 753, 56 Stat. 798, Ch. 619, October 21, 1942.
[132] *Id.* at §403 amending §811(f) of the Internal Revenue Code of 1939.
[133] *Id.* at §403(c) amending §826 of the Internal Revenue Code of 1939.

> 861, as the case may be. If there is more than one such person the executor shall be entitled to recover from such persons in the same ratio.[134]

The Act made a slight, but immaterial modification, to the §2206 Predecessor Provision.[135]

The House Ways and Means Report accompanying the Revenue Bill of 1942 offers this explanation for the enactment of the §2207 Predecessor Provision:

> A new subsection (d), added to section 826, entitles the executor to recover from the recipient of appointive property the portion of tax allocable to such property. The decedent, however, may provide otherwise in his will. This section applies where the recipient takes or holds the property upon the decedent's exercise, nonexercise, or release of the power, regardless of local rules with respect to the receipt of the property from the creator of the power. The purpose of this amendment is to achieve a fair and equitable apportionment of the tax burden attributable in part to appointive property.[136]

The Senate Finance Committee's Report accompanying the Revenue Bill of 1942 gave a similar explanation.[137]

During the public hearings of the House Ways and Means Committee, Randolph Paul, acting Tax Advisor to the Secretary of Treasury, argued to extend the recovery provisions to all non-probate properties.[138] Notwithstanding his recommendations and without explanation, Congress expanded tax recovery only to power of appointment properties.

By 1942, forty states had estate taxes.[139] New York had enacted a tax apportionment statute in 1930 which equitably apportioned all of the estate taxes, both state and federal, to all property includible in the gross estate.[140] The executor was given the power to collect the tax

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[134] *Id.*
[135] *Id.* at §404(b) amending §826(c) of the Internal Revenue Code of 1939.
[136] HOUSE OF REPRESENTATIVES, WAYS AND MEANS REPORT NO. 2333 TO ACCOMPANY H.R. 7378, THE REVENUE BILL OF 1942, 77TH CONG., 2ND SESS., REPORT NO. 2333, JULY 14, 1942.
[137] SENATE FINANCE COMMITTEE REPORT NO. 1631 TO H.R. 7378, THE REVENUE BILL OF 1942 provided the following:

> A new subsection (d), added to section 826, entitles the executor to recover from the recipient of appointive property the portion of tax allocable to such property. The decedent, however, may provide otherwise in his will. This section applies where the recipient takes or holds the property upon the decedent's exercise, nonexercise, or release of the power, regardless of local rules with respect to the receipt of the property from the creator of the power. The purpose of this amendment is to achieve a fair and equitable apportionment of the tax burden attributable in part to appointive property. Your committee bill makes a technical change in this provision to coordinate it with section 826(c) relating to the liability of life insurance beneficiaries, as amended by section 404(b) of your committee bill

[138] *See infra* Part IV wherein an excerpt from his comments at the Public Hearings are reproduced.
[139] Holley, *supra* note 127 at 6.
[140] N.Y. Laws 1930, c. 709, §124.

from the recipient of non-probate properties.[141] Pennsylvania enacted a tax apportionment statute in 1937 which equitably apportioned the estate taxes.[142] Maryland enacted a tax apportionment statute in 1937 which solely addressed apportionment between the decedent's estate and trusts created by the decedent.[143] Rhode Island enacted a tax apportionment statute in 1938 which equitably apportioned the additional estate taxes among probate and non-probate property but as to estate taxes apportioned to the probate property, the estate taxes were charged to the residue of the estate.[144] In addition, by 1942, several state courts had judicially apportioned estate taxes.[145] Although forty-two states had estate taxes in 1942, only four states had enacted tax apportionment statutes and only courts in a few jurisdictions had judicially apportioned estate taxes.[146]

H. Technical Changes Act of 1949

In the Technical Changes Act of 1949, Congress further expanded the definition of gross estate to include transfers in which the decedent retained a reversionary interest (current §2037).[147] Again, Congress expanded the definition of gross estate to include non-probate assets but did not accompany that expansion with compatible additional commensurate tax recovery provisions.

I. Internal Revenue Code of 1954

The Internal Revenue Code of 1954 incorporated all of the previously enacted estate tax provisions and expanded the gross estate again to include annuities.[148] The tax recovery provisions remained §§2205, 2206 and 2207.

J. Economic Recovery Tax Act (ERTA) of 1981

The Economic Recovery Tax Act (ERTA) of 1981 gave us an unlimited marital deduction and estate tax inclusion under §2044 for qualified terminable interest property

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[141] *Id. See* discussion of New York tax apportionment statute in Note, *New York's New Law Regulating the Estates of Decedents*, 47 BANKING L. J. 583, 588 (1930); Note, *Constitutionality of State Law Apportioning Incidence of Federal Estate Tax*, 51 YALE L. J. 1202 (1942); and the Court of Appeals of New York decision of In Re Del Drago's Estate, 287 N.Y. 61, 38 N.E.2d 131 (1941), rev'd by Riggs v. Del Drago, 317 U.S. 95, 63 S. Ct. 109 (1942).
[142] PA Pub. Laws 1937, No. 565, p. 2762.
[143] MD Laws 1937, c. 546.
[144] R.I. Gen. Laws C. 43, §16 (1938).
[145] *See* Eugene F. Scoles, *Apportionment of Federal Estate Taxes and Conflict of Laws*, 55 COLUM. L. REV. 261 (1955), f.n. 8 for a list of the decisions.
[146] *See* Eugene F. Karch, *The Apportionment of Death Taxes*, 54 HARV. L. REV. 10 (1940); Note, *Statutory Apportionment of Federal Estate Taxes*, 62 HARV. L. REV. 1022 (1949); and Scoles, *supra* note 145 for detailed discussions of apportionment of federal and state estate taxes in the first half of the 20th Century.
[147] 63 Stat. 891, Pub. L. No. 378, 81st Cong., approved by President on October 27, 1949.
[148] Internal Revenue Code of 1954, Section 2039. See Estate of Fusz, 46 T.C. 214, 216 (1966) wherein the court states "[s]ection 2039 had no predecessor."

("QTIP").[149] ERTA also granted to the decedent's estate a right to recover the additional estate taxes caused by the QTIP's inclusion in the surviving spouse's estate.[150]

The Report of the Committee on Ways and Means on H.R. 4242 provided:

> …the committee believes it appropriate to provide an apportionment rule to avoid imposition of any additional taxes on the property subject to qualifying terminable interests on the spouse's heirs and to insure that the transfer taxes imposed on property subject to certain terminable interests are borne by that property….

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[149] Pub. L. No. 97-34, §403(d)(4)(A); 95 STAT. 172, 304-05, Enacted: August 13, 1981.

[150] *Id.* at [cite]. The recovery provision read as follows:

> SEC. 2207A. RIGHT OF RECOVERY IN THE CASE OF CERTAIN MARITAL DEDUCTION PROPERTY.
>
> "(a) RECOVERY WITH RESPECT TO ESTATE TAX.—
>
> "(1) IN GENERAL.—If any part of the gross estate consists of property the value of which is includible in the gross estate by reason of section 2044 (relating to certain property for which marital deduction was previously allowed), the decedent's estate shall be entitled to recover from the person receiving the property the amount by which—
>
> "(A) the total tax under this chapter which has been paid, exceeds
>
> "(B) the total tax under this chapter which would have been payable if the value of such property had not been included in the gross estate.
>
> "(2) DECEDENT MAY OTHERWISE DIRECT BY WILL.—Paragraph (1) shall not apply if the decedent otherwise directs by will.
>
> "(b) RECOVERY WITH RESPECT TO GIFT TAX.—If for any calendar year tax is paid under chapter 12 with respect to any person by reason of property treated as transferred by such person under section 2519, such person shall be entitled to recover from the person receiving the property the amount by which—
>
> "(1) the total tax for such year under chapter 12, exceeds
>
> "(2) the total tax which would have been payable under such chapter for such year if the value of such property had not been taken into account for purposes of chapter 12.
>
> "(c) MORE THAN ONE RECIPIENT OF PROPERTY.—For purposes of this section, if there is more than one person receiving the property, the right of recovery shall be against each such person.
>
> "(d) TAXES AND INTEREST.—In the case of penalties and interest attributable to additional taxes described in subsections (a) and (b), rules similar to subsections (a), (b), and (c) shall apply."

The bill also provides apportionment provisions under which the additional estate taxes attributable to the taxation of the qualified terminable interest property (other than the spouse's life estate) are borne by that property.[151]

K. 1987, 1988 and 1990 Federal Tax Legislation

In the Omnibus Budget Reconciliation Act of 1987, Congress enacted §2036(c) to include in the gross estate property transferred by the decedent as part of an estate freeze.[152] In 1988, Congress amended §2036(c) and enacted §2207B to grant the decedent's estate a right to recover estate taxes arising from the inclusion of §2036(c) property in the gross estate.[153]

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[151] REPORT OF THE COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES ON H.R. 4242, TAX INCENTIVE ACT OF 1981, JULY 24, 1981, pp. 160-162. *See* also GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981 (H.R. 4242, 97TH CONGRESS; PUBLIC LAW 97-34); Prepared by the Staff of the Joint Committee on Taxation; December 29, 1981 wherein it is states "Congress believed it appropriate to provide an apportionment rule to insure that any transfer taxes imposed on qualified terminable interest property are borne by the persons receiving that property and not by the spouse or the spouse's heirs."

[152]Pub. L. No. 100-203, 101 Stat. 1330 (1987). For a detailed analysis of 2036(c) see S. Stacy Eastland, *The Legacy of I.R.C. Section 2036(c): Saving the Closely Held Business After Congress Made 'Enterprise' A Dirty Word*, 24 REAL PROP., PROB. & TR. J. 259 (1989).

[153] Pub. L. No. 100-647, 102 Stat. 3342, Sec. 3031(f), enacted Nov. 10, 1988. Section 2207B provided:

> "SEC. 2207B. RIGHT OF RECOVERY WHERE DECEDENT RETAINED INTEREST.
>
> "(a) ESTATE TAX.—
>
> "(1) IN GENERAL.—If any part of the gross estate on which tax has been paid consists of the value of property included in the gross estate by reason of section 2036 (relating to transfers with retained life estate), the decedent's estate shall be entitled to recover from the person receiving the property the amount which bears the same ratio to the total tax under this chapter which has been paid as—
>
> "(A) the value of such property, bears to
>
> "(B) the taxable estate.
>
> "(2) DECEDENT MAY OTHERWISE DIRECT BY WILL.—Paragraph (1) shall not apply if the decedent otherwise directs in a provision of his will (or a revocable trust) specifically referring to this section.
>
> "(b) GIFT TAX.—If for any calendar year tax is paid under chapter 12 with respect to any person by reason of property treated as transferred by such person under section 2036(c)(4), such person shall be entitled to recover from the original transferee (as defined in section 2036(c)(4) the amount which bears the same ratio to the total tax for such year under chapter 12 as—
>
> "(1) the value of such property for purposes of chapter 12,
> bears to
>
> "(2) the total amount of the taxable gifts for such year.

The Report of the Ways and Means Committee provides:

Present Law

> If any part of the gross estate on which tax has been paid consists of property includible because the decedent has at the time of his death a power of appointment with respect to the property, the executor is entitled to recover from the person receiving the property the portion of the total tax paid as the value of such property bears to the taxable estate. A similar rule applies when part of the gross estate on which tax has been paid includes proceeds of an insurance policy on the life of the decedent receivable by a beneficiary other than the executor. The executor is not, however, entitled to receive a portion of the estate tax from the recipient of the property which is includible under section 2036.

Explanation of Provision

> If any part of the gross estate consists of property includible by reason of section 2036, the estate is entitled to recover from the person receiving the property an amount which bears the same ratio of the total tax paid as the value of the includible property bears to the taxable estate. Similarly, if a gift is deemed by virtue of section 2036(c)(4), the original transferor is entitled to recover a like amount from the original transferee. The right of recovery shall be against all transferees and shall extend to interest and penalties attributable to the inclusion or gift. The right of contribution will not apply if the decedent otherwise directs in a provision of his will specifically referring to this provision, i.e., a specific reference to section 2207B.[154]

Presumably the recovery provision was added to address asset freezes, but the right of recovery was not limited exclusively to asset freezes includible under §2036(c). Rather, it applied to all transfers in which the decedent made a transfer retaining a life estate. [155] The Ways

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> "(c) MORE THAN ONE RECIPIENT.—For purposes of this section, if there is more than 1 person receiving the property, the right of recovery shall be against each such person.
>
> "(d) PENALTIES AND INTEREST.—In the case of penalties and interest attributable to the additional taxes described in subsections (a) and (b) rules similar to the rules of subsections (a), (b), and (c) shall apply.

"(e) NO RIGHT OF RECOVERY AGAINST CHARITABLE REMAINDER TRUSTS.—No person shall be entitled to recover any amount by reason of this section from a trust to which section 664 applies (determined without regard to this section)." *Id.* at 102 Stat. 3638.

[154] REPORT OF THE COMMITTEE ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES, REPORT NO. 100-795, 100TH CONG., 2D SESS., MISCELLANEOUS REVENUE ACT OF 1988, JULY 26, 1988.

[155] Pennell & Danforth, 834-1st Tax Memorandum, *Transfer Tax Payment and Apportionment*, f.n. 121.

and Means Report properly notes that the executor did not have a recovery right with respect to §2036 includible property even though similar rights were granted for life insurance and powers of appointment.[156] The Report curiously fails to explain why recovery should be expanded to §2036 includible property but not expanded to recovery of estate taxes resulting from the inclusion of the numerous other non-probate properties in the gross estate. It would appear that Congress sought to expand the recovery provision to address its expanded definition of gross estate arising from asset freezes.

In the Omnibus Budget Reconciliation Act of 1990, Congress repealed the asset freeze provisions of §2036(c).[157] Congress however retained §2207B, with only the gift tax recovery subsection being deleted.[158] With the repeal of §2036(c) asset freezes, retaining a right of recovery for retained life estates but not for other non-probate properties is puzzling.

L. Taxpayer Relief Act of 1997

In the Taxpayer Relief Act of 1997 (TRA '97), Congress amended paragraph 2 of both §§2207A and 2207B to provide consistency as to the specificity required for a decedent to "direct otherwise" and provide that the decedent's direction may be contained in a will or revocable trust.[159]

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[156] *See supra* body of text to note 154.
[157] Pub. L. No. 101-508, 104 Stat. 1388-491, Nov. 5, 1990, §11601(a).
[158] *Id*. at §11601(b).
[159] Pub. L. No. 105-34, §1032, 111 Stat. 787, enacted August 5, 1997. The amendment provided the following:

> SEC. 1302. CLARIFICATION OF WAIVER OF CERTAIN RIGHTS OF RECOVERY.
>
> (a) Amendment to Section 2207A.--Paragraph (2) of section 2207A(a) (relating to right of recovery in the case of certain marital deduction property) is amended to read as follows:
>
> ``(2) Decedent may otherwise direct.--Paragraph (1) shall not apply with respect to any property to the extent that the decedent in his will (or a revocable trust) specifically indicates an intent to waive any right of recovery under this subchapter with respect to such property.".
>
> (b) Amendment to Section 2207B.--Paragraph (2) of section 2207B(a) (relating to right of recovery where decedent retained interest) is amended to read as follows:
>
> ``(2) Decedent may otherwise direct.--Paragraph (1) shall not apply with respect to any property to the extent that the decedent in his will (or a revocable trust) specifically indicates an intent to waive any right of recovery under this subchapter with respect to such property.".

The House Report accompanying the bill gave this explanation for the changes:

> It is understood that persons utilizing standard testamentary language often inadvertently waive the right of recovery with respect to QTIP. Similarly, persons waiving a right to contribution are unlikely to refer to the code section granting the right. Accordingly, allowing the right of recovery (or right of contribution) to be waived only by specific reference should simplify the drafting of wills by better conforming with the testator's likely intent…. The bill provides that the right of recovery with respect to QTIP is waived only to the extent that language in the decedent's will or revocable trust specifically so indicates (e.g., by a specific reference to QTIP, the QTIP trust, section 2044, or section 2207A). Thus, a general provision specifying that all taxes be paid by the estate is no longer sufficient to waive the right of recovery. The bill also provides that the right of contribution for property over which the decedent retained enjoyment or the right to income is waived by a specific indication in the decedent's will or revocable trust, but specific reference to section 2207B is no longer required.[160]

TRA '97 represents the only time that Congress corrected one of the numerous inconstancies contained in §§2206, 2207, 2207A and 2207B.

PART III: CURRENT STATUS OF TAX APPORTIONMENT IN THE STATES AND THE DISTRICT OF COLUMBIA[161]

Today, forty-two states and the District of Columbia have tax apportionment statutes.[162] The other eight states do not have tax apportionment statutes, so judicial decisions establish tax

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> (c) Effective Date.--The amendments made by this section shall apply with respect to the estates of decedents dying after the date of the enactment of this Act.

[160] HOUSE REPORT 105-148 –REVENUE RECONCILIATION ACT OF 1997, COMMITTEE ON THE BUDGET, HOUSE OF REPRESENTATIVES TO ACCOMPANY H.R. 2014, June 24, 1997, §1302 of the bill. HOUSE REPORT 105-220, THE CONFERENCE REPORT ACCOMPANYING H.R. 2014 also contains a similar explanation.

[161] For a detailed analysis of the development of the tax apportionment statutes see Martin Alan Mitnick, *State Legislative Apportionment of the Federal Estate Tax*, 10 MD. L. REV. 289 (1949); Note, *Taxation – Equitable Apportionment of Federal Estate Tax on Non-Probate Property, Carpenter v. Carpenter, 267 S.W.2d 632 (Mo. 1954)*, 1955 WASH. U. L. Q. 89 (1955); Note, *Proposal for Apportionment of the Federal Estate Tax*, 30 INDIANA L. J. 217 (1955); Donald Glasberg, *Federal Estate Tax Apportionment*, 16 DEPAUL L. REV. 112 (1966); and Thomas M. Susman and Michael J. Fourticq, *Apportionment of Death Taxes: A Comprehensive Survey with Proposed Statute*, 45 TEX. L. REV. 1348 (1967).

[162] Pennell, *supra* note 10 at Worksheet 1. Since the publication of that worksheet, Kansas has enacted a tax apportionment statute. The authors have supplemented the analysis provided by the foregoing studies by a personal examination of the statutes. *Infra* footnotes 163-172, the authors identify the name of the states that contain a referenced provision. If the reader wishes to examine the state statute, please refer to the foregoing study for reference to the pertinent statute.

apportionment.[163] Of these fifty-one jurisdictions (fifty states and the District of Columbia), forty-seven equitably apportion estate taxes, with forty-one jurisdictions equitably apportioning all estate taxes while six jurisdictions equitably apportion all estate taxes with the exception that pre-residual devises are exempted from bearing estate taxes.[164] Two states charge all taxes to the residue, both by judicial decree, not by statute.[165] In Arizona and Georgia, the state of estate tax apportionment is not clear enough to determine how estate taxes are apportioned.[166]

The tax apportionment statutes in eleven states specifically provide that the federal tax recovery provisions govern.[167]

In seventeen of the states, QTIPs must bear estate taxes at the marginal rate.[168]

In every jurisdiction, the decedent may direct against the application of the statute in a will.[169] In twenty-six states, such direction can be contained in a revocable trust or another dispositive instrument.[170]

Thirty-three of the states use the following terms in connection with the standard necessary to direct against statutory application: "provides," "otherwise provides," "otherwise provided," "may direct," "otherwise directs," "otherwise directed," "as directed," or "make direction." [171] Statutes in ten states appear to contain more stringent standards by using the following words: "expressly and unambiguously," "expressly indicate," "specific direction," "specifically indicates an intent," "specifically," and "specifically directs."[172]

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[163] *Id.* The eight states without tax apportionment statutes are: Arizona, Georgia, Illinois, Iowa, Kentucky, Missouri, Oklahoma and Wisconsin.

[164] *Id.* The six states with general equitable apportionment but excepting pre-residual devises from apportionment are: Florida, Michigan, New Jersey, Ohio, Pennsylvania and Washington.

[165] *Id.* The two states are Iowa and Wisconsin.

[166] Pennell, *supra* note 10 at Worksheet 1.

[167] *Id.* The eleven states are California, Florida, Kansas, Massachusetts, Michigan, Mississippi, New Jersey, New Hampshire, North Carolina, South Dakota and Texas.

[168] *Id.* The seventeen states are Alabama, Arkansas, Delaware, Florida, Idaho, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Ohio, Pennsylvania, South Dakota, Texas, Virginia and Washington.

[169] *Id.*

[170] The twenty-six states are Alabama, Arkansas, California, Connecticut, Delaware, Florida, Idaho, Indiana, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Texas, Utah, Virginia, Washington and West Virginia.

[171] The statutes in the following sixteen states contain the phrase "otherwise provides:"Alaska, Hawaii, Maine, Massachusetts, Minnesota, Mississippi, Montana, New Hampshire, New York, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Vermont and Wyoming. The statutes in Colorado, District of Columbia, Maryland and Utah contain the phrase "otherwise provided." The statutes in Connecticut, Michigan, Nevada, New Jersey and Tennessee contain the phrase "otherwise directs." Nebraska's statute contains the phrase "otherwise directed." Louisiana's statute uses "as directed." The phrase "may direct" is contained in Pennsylvania's statute. Simply the word "provides" is used in North Carolina, Rhode Island and Washington's statute. The phrase "make direction" is contained in Virginia and West Virginia's statutes.

[172]The term ""expressly and unambiguously" is contained in the Uniform Estate Tax Apportionment Act (2003), §3(a) and is contained in the following four states that have adopted the uniform act with

In summary, equitable apportionment is the rule in a super majority of the states. Two states have intentionally retained their common law of apportioning estate taxes to the residue. In two other states clarity is lacking.

PART IV: COMMENTATORS

As noted *supra* in Part II(B)(2), initially the majority of the courts examining the language that now comprises §2205 concluded that Congress had intentionally burdened the residue with the federal estate tax. One commentator in 1942, labeling the predecessor code section to §2205 as "controversial,"[173] argued that the legislative history fails to provide any clear guidance as to whether Congress intended to charge the residue with all of the federal estate taxes.[174] The commentator suggested that Congress either enact a "federal statute expressly fixing the incidence of the tax or one that would permit the states to do so."[175] The author noted that tax apportionment by the states would cause less administrative difficulty and further noted that there was a bill before Congress that would allow the States to apportionment the federal estate tax.[176] The bill was not enacted because within five months the Supreme Court in *Riggs v. Del Drago* held that the predecessor to §2205 did not preempt state tax apportionment, thereby obviating the need for legislation.[177]

Randolph Paul, acting Tax Advisor to the Secretary of Treasury, in his presentation before the U.S. House Ways and Means Committee in 1942, noted the following:

> At the present time there is no provision apportioning the estate-tax liability among the beneficiaries of the estate other than a provision relating to life insurance. There is no sound basis for having an express provision apportioning liability in regard to life insurance without similar provisions covering other transfers subject to the estate tax. It is therefore suggested that there be incorporated in the estate tax an apportionment provision which would apportion the liability for tax in those cases in which the decedent did not himself prescribe a method of apportionment.[178]

Similarly, in 1955 another commentator noted "it is difficult to understand the legislative purpose in leaving to the several states the determination of the ultimate burden of the tax with

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revisions: Alabama, Arkansas, Idaho and New Mexico. The following phrases are contained in the state referenced: Florida - "expressly indicate;," California and Kansas – "specifically," Indiana - "specific direction;" Delaware – "specifically indicates an intent;" Texas - "specifically directs."

[173] Note, *Constitutionality of State Law Apportioning Incidence of Federal Estate Tax*, 51 YALE L. J. 1202 (1942) at f.n. 2.

[174] *Id.* at 1206-1207.

[175] *Id.* at 1208.

[176] *Id.*

[177] *Riggs v. Del Drago*, 317 U.S. 95, 63 S. Ct. 109 (1942).

[178] HEARINGS BEFORE THE H. COMM. ON WAYS & MEANS ON REVENUE REVISION OF 1942, 77TH CONG., 2ND SESS. VOL. 1, p. 94 (1942).

only those exceptions mentioned above [sections 2206 and 2207]."[179] The commentator argued for a federal estate tax apportionment statute in order to bring certainty.[180] The commentator noted that the law was unsettled in twelve states because those states had not enacted a tax apportionment statute nor had those states' courts established a body of common law.[181]

Another commentator has noted that a comprehensive federal tax apportionment statute "could greatly increase the effectiveness of statutory apportionment by establishing a uniform method of apportioning the federal tax and by reducing the executor's difficulties in collecting the tax prorated against property and recipients outside the decedent's domicil."[182]

Eugene F. Scoles argued that the best method to address apportionment of federal estate taxes is federal legislation.[183] He notes:

> [i]f federal apportionment legislation as to insurance proceeds and property subject to powers of appointment is necessary, the need for uniformity makes a comprehensive apportionment statute as to all assets necessary. Congress should either repeal Internal Revenue Code sections 2206 and 2207 as far as they apply to this area or amend them to cover the entire estate, and thus remove the conflict of laws problem within the United States.[184]

Professor Donna Litman advocates for comprehensive federal estate tax apportionment which would equitably apportion the tax to all non-probate property and address deductions and credits.[185] Her proposed solution would have federal law address outside apportionment while state law would address inside apportionment.[186] Her well considered proposal is analyzed more fully *infra* in Part V(A). In the event her proposal for comprehensive reform is not adopted, she also offers amendments to the current tax recovery code sections.[187]

Professor Ira Mark Bloom notes that the federal recovery code sections complicate tax apportionment, are no longer needed since equitable apportionment applies in nearly all the states, [188] and argues for outright repeal of the federal recovery provisions.[189] In Part V(C), we explore repeal.

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[179] Note, *Proposal for Apportionment of the Federal Estate Tax*, 30 INDIANA L. J. 217, 221 (1955).
[180] *Id.* at 238.
[181] *Id.* at 224.
[182] Note, *Statutory Apportionment of Federal Estate Taxes*, 62 HARV. L. REV. 1022, 1029-30 (1949).
[183] Scoles, *supra* note 145 at 309-10.
[184] *Id.*
[185] Litman, *supra* note 9 at 397 .
[186] *Id.*
[187] *Id*. *See infra* Part V(B) wherein Professor Litman's proposed amendments are set forth.
[188] Ira Mark Bloom, *Unifying the Rules for Wills and Revocable Trusts in the Federal Estate Tax Apportionment Arena: Suggestions for Reform*, 43 REAL PROB., PROB. & TR. J. 447, 494 (2008).
[189] *Id*. at 495.

PART V: PROPOSALS TO ADDRESS INCONSISTENCIES AND ISSUES

A. Comprehensive Federal Tax Apportionment

In her article, Professor Donna Litman argues:

> It would be appropriate for the Code to expand its present selective recovery provisions into a uniform, comprehensive federal tax apportionment system employing equitable apportionment. Under a uniform system, federal law could equitably apportion the tax attributable to all nonprobate assets after making allowances for inurement of certain deductions and credits. If necessary, an exception could be created to allow the apportionment of the tax attributable to QTIP to be made at the highest marginal rates, and then to apportion the remaining tax on an equitable basis using the average rate applicable to the balance of the tax. These federal apportionment rules would defer to the decedent's intent as expressed in appropriate documents and address the issue of conflicting provisions in those documents. State law would continue to apportion tax attributable to the probate estate. In addition, state law would apportion tax among beneficial interests under trusts included in the gross estate and between life estates and remainder interests in nontrust property included in the gross estate."[190]

Litman proposes a federal tax apportionment statute which would address the apportionment of federal estate tax among the various interests included in the federal gross estate.[191] Her proposal would establish a federal standard to determine if the decedent had directed the apportionment of federal estate tax and would specifically address which document controls if conflicting provisions exist.[192]In Litman's proposal, state law would still determine the apportionment of federal estate tax attributable to the probate estate and among beneficial interests inside each interest included in the federal gross estate.[193]In other words, tax apportionment would be achieved using dual modalities: federal law would apportion federal estate tax among includible interests, while state law would determine how the tax would be charged among the beneficiaries of each interest.

Litman's proposal falls short of a comprehensive federal tax apportionment statute. True comprehensive reform would include statutes addressing the apportionment of tax among interests included in the gross estate and among the beneficiaries of each of those interests, apportionment of taxes inside each entity, establish a single federal standard to direct against its application, and determine whether the pertinent documents met the standard to do so. True comprehensive reform would require that the final product be similar to a comprehensive estate tax apportionment act. Such a broad and comprehensive standard would led to uniformity of

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[190] Litman, *supra* note 9 at 397.
[191] *Id.*
[192] *Id.*
[193] *Id.*

federal estate tax apportionment and substantially ease the burden of the Internal Revenue Service and tax practioners. Over time, federal case law would develop and provide precedent for determining future apportionment issues.

Both Litman's proposal and truly comprehensive reform would represent a substantial shift from current law which rests apportionment of estate taxes with the states. As discussed *supra* in Part I(B)(1), there has been some federal encroachment into tax apportionment, but courts still rely heavily on state case law to determine whether the decedent's intent has been sufficiently expressed. Comprehensive reform would shift the apportionment of federal estate taxes to a federal standard, thus leaving only apportionment of state estate taxes to the state.

B. Amending Tax Recovery Code Sections[194]

While the concept of uniformity of federal tax apportionment across the United States has appeal, query whether the political will exists for such a significant departure from existing law. Amending the current tax recovery code sections to address the inconsistencies and issues set forth *supra* in Part I is another alternative, which may have greater chance of political success. The amendments would not limit the recovery right to the executor or the decedent's estate. Rather, any party who pays more than his or her apportioned tax liability would be able to recover from the party who is apportioned the tax. In addition, the right of recovery would be expanded to permit recovery with respect to all estate tax inclusionary code sections. A single standard would be established to direct against the application of the recovery provisions. The tax calculation issue set forth *supra* in Part I (10) would be addressed.

Current sections §§2205, 2206 and 2207 would be deleted and their provisions included in §2207B. Sections 2207A and 2207B would be amended to read as follows:

§ 2207A. Right of recovery in the case of certain marital deduction property

(a) Recovery with respect to estate tax

(1) In general

If any part of the gross estate consists of property the value of which is includible in the gross estate by reason of section 2044 (relating to certain property for which marital deduction was previously allowed), the executor, or any other person paying the tax, shall be entitled to recover from the person receiving the property the amount by which—

(A) the total tax under this chapter which has been paid, exceeds

(B) the total tax under this chapter which would have been payable if the net value of such property had not been included in the gross estate.

(2) Decedent may otherwise direct

[194] *See supra* Part I and Litman, *supra* note 9 at 397-398 for a detailed list of the inconsistencies and issues to be addressed if amendments are made rather than comprehensive reform.

Paragraph (1) shall not apply with respect to any property to the extent that the decedent in his will (or a revocable trust or any other dispositive instrument) specifically indicates an intent to waive any right of recovery under this subchapter with respect to such property.

(b) Recovery with respect to gift tax

If for any calendar year tax is paid under chapter 12 with respect to any person by reason of property treated as transferred by such person under section 2519, such person shall be entitled to recover from the person receiving the property the amount by which—

(1) the total tax for such year under chapter 12, exceeds

(2) the total tax which would have been payable under such chapter for such year if the value of such property had not been taken into account for purposes of chapter 12.

(c) More than one recipient of property

For purposes of this section, if there is more than one person receiving the property, the right of recovery shall be against each such person.

(d) Penalties and interest

In the case of penalties and interest attributable to additional taxes described in subsections (a) and (b), rules similar to subsections (a), (b), and (c) shall apply.

(e) Value

Value means the pecuniary worth of the Section 2044 property as finally determined for purposes of the estate tax after deducting any debt, expense, or other deduction chargeable to the Section 2044 property for which a deduction was allowed in determining the amount of the estate tax. A lien or other encumbrance is not regarded as chargeable to the Section 2044 property to the extent that it will be paid from other property. The value of the Section 2044 property is not reduced by reason of the charge against it of any part of the estate tax.

§ 2207B. Right of recovery from non-probate assets

(a) Estate tax

(1) In general

If any part of the gross estate on which tax has been paid consists of the value of property included in the gross estate by reason section 2035 (relating to gifts made within 3 years of decedent's death), section 2036 (relating to transfers with retained life estate), section 2037 (relating to transfers taking effect at death), section 2038 (relating to revocable transfers), section 2039 (relating to annuities), section 2040 (relating to joint interests), section 2041 (relating to powers of appointment), section 2042 (relating to life insurance), and section 2043 (relating to transfers for insufficient consideration) or Chapter 14 (special valuation rules), the executor, or any other person paying the tax, shall be entitled to recover from

the person receiving the property the amount which bears the same ratio to the total tax under this chapter which has been paid as—

(A) the value of such property, bears to

(B) the taxable estate.

(2) Decedent may otherwise direct

Paragraph (1) shall not apply with respect to any property to the extent that the decedent in his will (or a revocable trust and any other dispositive instrument) specifically indicates an intent to waive any right of recovery under this subchapter with respect to such property.

(b) More than one recipient

For purposes of this section, if there is more than 1 person receiving the property, the right of recovery shall be against each such person.

(c) Penalties and interest

In the case of penalties and interest attributable to the additional taxes described in subsection (a), rules similar to the rules of subsections (a) and (b) shall apply.

(d) No right of recovery against charitable remainder trusts

No person shall be entitled to recover any amount by reason of this section from a trust to which section 664 applies (determined without regard to this section).

(e) Value

Value means the pecuniary worth of the interest as finally determined for purposes of the estate tax after deducting any debt, expense, or other deduction chargeable to the interest for which a deduction was allowed in determining the amount of the estate tax. A lien or other encumbrance is not regarded as chargeable to the interest to the extent that it will be paid from other property. The value of the interest is not reduced by reason of the charge against it of any part of the estate tax.

(f) Calculation if Section 2044 Property Includible in Estate

If the gross estate consists of property includible by reason of section 2044 and to the extent the right of recovery of section 2207A(a)(1) has not been waived, then for purposes of subsection (a)(1) of this section:

(1) the "total tax" paid shall be reduced by the tax computed in accordance with the manner set forth in Section 2207A(a)(1); and

(2) the "taxable estate" shall be reduced by the value of such Section 2044 property.

If these statutory proposals were enacted, the expansion of recovery to all non-probate properties will not alter existing law in forty-six states and the District of Columbia, since equitable apportionment already applies in these jurisdictions. These changes would merely provide consistency and coverage lacking in the current tax recovery code sections.

C. Repeal

In 1918, no state had a tax apportionment statute.[195] While most states had an inheritance tax, that tax is imposed on the property received by the recipient rather than on the general estate and therefore cannot serve as precedent for apportionment of estate taxes.[196] The only precedent for imposition of death taxes on the general estate is the federal probate duty imposed in 1797 and 1862.[197] While a probate duty was charged to the residuary estate, it was always de minims in amount.[198] By 1918, only one state had an estate tax.[199] Only one published decision existed with respect to tax apportionment.[200] In 1918, there was no body of law that addressed who should bear the impact of estate taxes.[201] Due to this absence, Congress may have been justified in granting an executor a right of recovery for life insurance included in the gross estate. It is puzzling however why Congress would have limited the recovery only for estate taxes for life insurance included in the gross estate without a similar right for other non-probate properties included in the gross estate.[202]

Congress partially redeemed itself for its apparent oversight in 1918 by enacting a right of recovery for powers of appointment in 1942.[203] By then, the death tax landscape had changed: forty states had estate taxes,[204] yet the status of tax apportionment had changed only slightly. Four states had tax apportionment statutes.[205] A few published court cases had apportioned estate taxes.[206] In the Revenue Act of 1942, Congress substantially expanded the gross estate to include general powers of appointment, whether exercised or not, and certain limited powers of appointment, whether exercised or not. [207] Given the lack of developed estate tax apportionment law in 1942, Congress may have been justified in granting the executor a right to recover the estate taxes caused by the inclusion of powers of appointments in the gross estate, especially given the expansion of the gross estate to include unexercised powers and limited powers of appointment. As stated in the House Ways and Committee Report: "[t]he purpose of this amendment [right of recovery for powers of appointment] is to achieve a fair and equitable

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[195] *See supra* Part II(C).
[196] Pennell, *supra* note 10 at III(D)(2).
[197] *See supra* Part II(A).
[198] *See supra* note 99.
[199] *See supra* Part II(C).
[200] *See supra* Part II(B)(2).
[201] *See supra* Part II(C).
[202] *See supra* Part II(C). The Revenue Act of 1918 expanded the definition of the gross estate to include both life insurance and exercised powers of appointment. The Revenue Act of 1918 also set forth the properties referenced in the gross estate in the Revenue Act of 1916. The legislative history provides no insight why a right to recovery was provided for only one of the newly enacted inclusionary provisions and not extended to the other non-probate inclusionary provisions contained in the same act.
[203] *See supra* Part II(G).
[204] *See supra* note 128.
[205] *See supra* Part II(G).
[206] *See* cases reported by Scoles, *supra* note 145 at f.n. 8.
[207] *See supra* Part II(G).

apportionment of the tax burden attributable in part to appointive property."[208] Arguably, Congress was providing a right of recovery where one might not otherwise exist. But why Congress would not have extended recovery to all non-probate properties remains baffling, especially since acting Tax Advisor to the Secretary of Treasury had expressly recommended doing so.[209]

In 1981, Congress enacted the unlimited marital deduction and the concept of qualified terminable interest property (QTIP). [210] By that time, thirty-seven states had tax apportionment statutes.[211] Courts in nearly every jurisdiction had published decisions concerning estate tax apportionment.[212] The legislative history is clear that Congress did not want to burden the surviving spouse's estate with any of the estate taxes caused by the inclusion of QTIP in the surviving spouse's estate.[213] Since QTIP was an entirely new concept without any federal or state law addressing it, Congress could have concluded that granting the executor a right to recover the additional estate taxes caused by the QTIP's inclusion in the surviving spouse's gross estate was in order to avoid significant diminution of the surviving spouse's estate plan.

In 1988, Congress once again expanded the definition of gross estate to include former §2036(c) property. [214] In so doing, Congress granted the decedent's estate a right of recovery with respect to the inclusion of such property in the gross estate.[215] Forty-three states had tax apportionment statutes by the end of 1988 and most equitably apportioned the estate taxes.[216] Congress could have then concluded that federal tax apportionment was unnecessary. Retaining §2207B in 1990 after repealing §2036(c) remains suspect since §2036 properties had been included in the gross estate for the 56 year period from 1932 to 1988 without a recovery provision.[217]

As we have discussed, equitable apportionment is the current law in all but four states.[218] Two of those four states have intentionally decided to burden the residue with all of the estate taxes unless the decedent directs otherwise.[219] Since determining the decedent's intent is

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[208] *See supra* note 136.
[209] *See supra* Part IV at body of text to note 178.
[210] *See supra* Part II(J).
[211] *See* Gail D. Potysman, *Federal Estate Tax Apportionment*, 54CHI.-KENT L. REV. 943 (1978), at f.n. 12 wherein the author references the estate tax apportionment statutes in thirty-six states. By 1981, Maine enacted a tax apportionment statute (1979, c. 540) bringing the total to thirty-seven in 1981.
[212] Maurice T. Brunner, Annotation, *Ultimate Burden of Estate Tax in Absence of Statute, Will, or Other Provision*, 68 A.L.R.3D 714 (1976) and Maurice T. Brunner, Annotation, *Construction and Application of Statutes Apportioning or Prorating Estate Taxes*, 71 A.L.R.3D 247 (1976).
[213] *See supra* Part II(J).
[214] *See supra* Part II(K).
[215] *Id.*
[216] *See* Carolyn Burgess Featheringill, *Estate Tax Apportionment and Nonprobate Assets: Picking the Right Pocket*, 21 CUMB. L. REV. 1 (1990/1991), at f.n. 29 wherein the author lists the statutory references to the state tax apportionment statutes.
[217] *See supra* Part II(K).
[218] *See supra* Part III.
[219] *Id.*

generally the purview of state law, and all but two of the states have firmly established tax apportionment laws, what need is there for any federal right to tax recovery?

Congress may have been justified in enacting §§2205, 2206 and 2207 due to the lack of tax apportionment law in effect at the time of their enactments; but the failure by Congress to address tax recovery for other estate tax inclusionary provisions remains a mystery. Section 2207A can be justified due to QTIP's uniqueness, but little justification exists for §2207B, and the justification that did exist when it was enacted evaporated when former §2036(c) was repealed. Now, that tax apportionment is settled law in all but two states, it may be time for the federal government to exit tax recovery and allow the states to apportion all of the estate taxes, both federal and state.

1. Repeal of §§2206, 2207 & 2207B

If §§2206, 2207 and 2207B are repealed, state law alone will govern the apportionment of tax on the properties addressed by these code sections. In forty-six states and the District of Columbia, repeal of §§2206, 2207 and 2207B would have no impact whatsoever since the applicable state law (either statutory or common law) equitably apportions the estate taxes, thus providing the same result as these code sections.[220]

In two of the remaining four states, if these three code sections are repealed, the federal estate taxes arising from the inclusion of life insurance, powers of appointment, and retained life estates, will be borne by the residuary estate unless the decedent otherwise directed. The tax would be apportioned in a manner different than under current law. However, in these two states, the tax would be borne in the same manner as other non-probate properties. While the result would differ, tax apportionment uniformity in these two states would be established. It is hard to imagine that testators in these two states would want the residue to pay the tax on most non-probate properties included in the gross estate, but not the tax on life insurance, powers of appointment and retained life estates.

As noted *supra* in Part III, in two states, it's presently unclear how estate taxes are apportioned. In these two states, repeal of §§2206, 2207 and 2207B would cause the apportionment of the covered inclusionary properties to be added to the body of unknown apportionment.[221]

2. Repeal of §2207A

Repeal of section 2207A would shift the tax liability from the QTIP to other individuals. Seventeen states have statutes requiring that QTIP property bear the additional estate taxes

[220] *Id.*

[221] Arguably, the result in one of these states, Georgia, would be different since its statute states that the state statute does not impair the right of recovery under federal law.

caused by its inclusion in the surviving spouse's federal gross estate, [222] repeal of §2207A would have no impact in these states. In twenty-nine states and the District of Columbia, repeal of §2207A would relieve QTIP property of tax to the extent of the difference between pro rata apportionment and apportionment at the marginal rate. Given the essential flat estate tax rate, at first glance this issue may appear to be minimal.[223] Since the applicable exclusion amount exceeds $5,000,000, the highest estate tax bracket of 40% is applied to all taxes. However repeal of §2207A would likely cause a different tax result because of the treatment of tax credits. For example, assume the surviving spouse dies in 2015 with a QTIP Trust with assets valued at $3,430,000, probate assets valued at $3,430,000 and no adjusted taxable gifts. The total estate (ignoring all deductions) would be $6,860,000. The estate would incur $572,000 of estate taxes.[224] Under §2207A, because the QTIP must bear the additional estate taxes caused by its inclusion, it must bear all of the $572,000 of estate taxes. In this example, the entire probate estate receives the benefit of the applicable exclusion amount. If §2207A were repealed, both the probate estate and the QTIP Trust would split the applicable exclusion amount. Immediate repeal of §2207A could substantially alter the apportionment of the estate taxes in all but seventeen states. Therefore, if §2207A is repealed, consideration should be given to having it apply to all documents executed as of a certain date (which may even be in the future) in order to provide time in which to study the amendment. For example, if §2207A is repealed in 2016, the law could provide that current §2207A applies to all documents executed on or before January 1, 2018. Drafters familiar with the change of the law would be advised to specifically state how estate taxes are to be apportioned until the new law is fully operational.

3. Repeal §2205

In light of existing state law remedies allowing an individual, including the executor, to recover estate taxes from the individuals apportioned the estate tax, what does §2205 achieve?[225] It has been asserted that one of the remaining roles of §2205 is to "give a federal court jurisdiction over a case in which one private party is suing another to enforce an alleged contribution right under state law."[226] Query the need and the advisability of the federal courts examining tax apportionment matters which most often involve the interpretation of the decedent's will. Generally, probate matters are not within the purview of the federal courts.[227]

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[222] See supra Part III.
[223] While §2001 sets forth the graduated rates, the top estate tax bracket is reached for estates exceeding $5,430,000, which is equal to the applicable exclusion amount.
[224] ($3,430,000 + $3,430,000 - $5,430,000) x 40%. *See* section 2001.
[225] *See* Part I(A).
[226] 6 Mertens, THE LAW OF FEDERAL GIFT AND ESTATE TAXATION §44.06, at 109 f.n. 37 (1960).
[227] *See* Marshall v. Marshall, 126 S.Ct. 1735 (2006); Eric W. Penzer and Frank T. Santoro, *The Probate Exception to Federal Jurisdiction*, 39 NYSBA TR. & EST. LAW SEC. NEWSLETTER 3 (2006); Robert M. Harper, *The Probate Exception to Federal Jurisdiction*, 23 PROB. & PROP. NO. 1, 60-63 (Jan/Feb 2009);

Section 8 of the Uniform Estate Tax Apportionment Act (1964), enacted in numerous states, and grants non-residents the right to institute an action in the state against the decedent's estate or any person residing in the state to seek recovery of estate taxes paid on behalf of the resident.[228] Access to federal court can also be obtained based on diversity of jurisdiction.[229] Federal court jurisdiction based on subject matter is not needed and is ill advised since invariably the decedent's intent will need to be examined, and that task is best left to state courts. Arguably, section 2205 has outlived its usefulness and can be safely repealed.

PART VI. CONCLUSION

The current federal tax recovery provisions were enacted in an ad hoc manner over seventy-two years.[230] Congress has never comprehensively examined the tax recovery provisions.[231] Either a comprehensive tax apportionment statute needs to be enacted, the current tax recovery provisions be amended to eliminate inconsistencies, or the tax recovery provisions need to be entirely repealed.

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and James E. Pfander and Michael J.T. Downey, *In Search of the Probate Exception*, 67 VAND. L. REV. 1533 (2014) .

[228]The following states have enacted the Uniform Estate Tax Apportionment Act (1964): Colorado, Hawaii, Maryland, Massachusetts, Mississippi, New Hampshire, North Carolina, Rhode Island, Utah and Vermont. *See* www.uniformlaws.org last visited May 18, 2015.

[229] 28 U.S.C. §1332(a)(1).

[230] *See supra* Part II.

[231] *Id*.