

## **MARKS PANETH TAX ALERT: HOW THE IRS RULING ON THE TAX TREATMENT OF SAME-SEX MARRIED COUPLES IMPACTS TAX AND ESTATE PLANNING**

In Revenue Ruling 2013-17, the IRS clarified that a same-sex couple's marital status for federal tax purposes is determined by the laws of the state where they got married — not the state where they reside. The ruling, which takes effect Sept. 16, 2013, will have a significant tax and estate planning impact on same-sex married couples. For example, it generally *requires* legally married same-sex couples to file their 2013 federal tax returns jointly or as married filing separately. This requirement also applies to extended 2012 returns filed after Sept. 15, so couples who wish to file as single or head of household must do so before Sept. 16.

### **What is marriage?**

The IRS ruling was prompted by the U.S. Supreme Court's landmark June 26 decision in *United States v. Windsor*. In that case, the Court struck down as unconstitutional Section 3 of the Defense of Marriage Act (DOMA), which defined "marriage," for purposes of federal law, as a legal union between a man and woman as husband and wife, and which defined "spouse" as a husband or wife of the opposite sex.

As a result of *Windsor*, same-sex married couples may be entitled to hundreds of federal benefits previously limited to heterosexual couples, including several income tax and estate planning advantages. Of course, most federal regulations are written with opposite-sex married couples in mind, so implementing the Supreme Court's mandate requires the IRS and other federal agencies to rewrite or reinterpret their rules.

Revenue Ruling 2013-17 clarifies that the IRS will interpret all Internal Revenue Code references to "husband and wife," "husband," and "wife" to include same-sex spouses lawfully married under state law. The ruling also addresses a question the Supreme Court left unanswered: What happens if a same-sex couple got married in one state but resides in or moves to a state that doesn't recognize same-sex marriage?

The IRS adopted a state-of-celebration approach: Same-sex couples who marry in a state (or foreign country) that authorizes such unions are considered to be lawfully married for federal tax purposes, "even if they are domiciled in a state that does not recognize the validity of same-sex marriages." The IRS explained that a state-of-domicile approach — under which the marital status of same-sex couples would change as they move about the country — would create an administrative nightmare for the IRS, taxpayers, employers and benefit plan administrators.

### **How does the ruling affect income tax planning?**

Starting Sept. 16, all *original* returns (as opposed to amended returns) filed by same-sex married couples must reflect their marital status. In other words, subject to a narrow exception that allows a married individual to file as head of household in certain circumstances, these couples must file jointly or as married filing separately. This may or may not provide an advantage, depending on a couple's particular circumstances.

For example, spouses who earn roughly the same amount of income may experience the "marriage penalty," under which married couples face a higher combined tax on their joint income than

they would as single filers. On the other hand, couples with one wage-earner or with widely disparate incomes may enjoy a marriage *bonus*. Other tax items that may be affected by marital status include personal and dependency exemptions, employee benefits, IRA contributions, child tax credits, and the gain exclusion for sale of a principal residence.

One potential advantage of married status is that employer-paid health care coverage for an employee's spouse is excluded from income and exempt from FICA payroll taxes. Those who paid taxes in previous years on health care coverage provided to a same-sex spouse should consider amending their returns for those years to reflect their married status. (Under certain circumstances, employers can also seek refunds of their FICA contributions. The IRS plans to announce special procedures for such refunds in the near future.)

Generally, taxpayers can amend their returns and claim a refund within three years after filing or within two years after paying the tax, whichever is later. For most people, this means tax years 2010, 2011 and 2012. Keep in mind, however, that both spouses will have to amend their returns to file jointly and all aspects of their returns will have to be recalculated. So, before filing an amended return for a particular year, it's important to crunch the numbers to be sure it will produce a refund and not an additional tax bill.

As previously noted, same-sex married couples who obtained extensions to file their 2012 returns can't use the filing status of single after Sept. 15. Although there isn't much time, these couples should compare the relative benefits of filing joint or individual returns and consider filing before Sept. 16 if doing so would allow them to use single status to lower their tax bills.

### **How does the ruling affect estate planning?**

Married couples have several advantages when it comes to gift and estate taxes. For example, the marital deduction, a key component of many estate planning strategies, allows U.S. citizen spouses to transfer unlimited assets to each other, through lifetime gifts or bequests at death, free of federal gift and estate taxes.

Married couples also enjoy exemption portability, which allows a surviving spouse to take advantage of a deceased spouse's unused gift and estate tax exemption. And they can "split" gifts, essentially doubling the amounts a spouse can give tax-free using his or her annual exclusion or lifetime gift tax exemption.

Same-sex spouses hit with gift or estate taxes in previous years as a result of DOMA should consider filing amended returns and claiming a refund.

### **What about state taxes?**

Revenue Ruling 2013-17 addresses only the *federal* tax treatment of same-sex spouses. States that don't recognize same-sex marriages aren't required to permit same-sex spouses to file jointly or to extend to them any benefits of married status. But the ruling will have an indirect impact in states that don't recognize same-sex marriages but require taxpayers to calculate their state tax liability based on information from their federal returns.

In those states, preparing state returns will likely require additional guidance from state tax authorities or legislatures.

### **What about domestic partnerships?**

The ruling states that the IRS will *not* recognize registered domestic partnerships, civil unions or similar relationships (same-sex or heterosexual) as marriages for federal tax purposes.

### **Review your situation**

Revenue Ruling 2013-17 is a critical development for legally married same-sex couples. If it applies to you, we'll be happy to discuss the ruling's impact on your tax and estate planning.

## JOIN US ON OCTOBER 17 FOR A PRIVATE FOUNDATION SEMINAR

Together with AMG National Trust Bank, Marks Paneth LLP will be hosting a seminar on the responsibilities of private foundation boards and their management at our Manhattan headquarters on the morning of October 17 beginning at 8:30 AM. For more information or to register, please contact Kelly Parkhurst of Marks Paneth by phone at 212.710.1778 or by email at [kparkhurst@markspaneth.com](mailto:kparkhurst@markspaneth.com).

## TAX PLANNING GUIDE

To facilitate ongoing access to the latest tax rules and regulations, Marks Paneth offers an [online tax guide](#) that is updated on an ongoing basis.

## FOR MORE INFORMATION



If you have questions about anything you read either in this alert or our tax planning guide, please contact a Marks Paneth [tax advisor](#) or [Steven Eliach, JD, LL.M.](#), the Principal-in-Charge of the Marks Paneth Tax Practice, by phone at 212.503.6388 or by email at [seliach@markspaneth.com](mailto:seliach@markspaneth.com)

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