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Same-Sex Spouses Face State Tax Uncertainty

By Marvin Kirsner

The U.S. Supreme Court's striking down of the Defense of Marriage Act has created a legal quagmire when it comes to the way same-sex married couples are taxed in states that don't recognize such marriages.

The Internal Revenue Service (IRS) has ruled that it will treat lawfully married same-sex couples (LMSSCs) as married even if they live in a non-recognition state. The treatment is not optional: Same-sex married couples must file as married, whether or not they live in a state that recognizes the marriage. They still have the option of filing as a married couple either jointly or separately.

The IRS ruling has created a major administrative problem for the tax agencies of the 28 non-recognition states that impose a personal income tax. Most states use the taxpayer's federal taxable income as a starting point for their state income tax. But if married same-sex couples files their federal return as married, the non-recognition states' tax rules will need to be modified. These laws will in most cases need to be amended by state legislatures, and some states might not be able to do this in time for the 2013 tax year filing season. This could lead to chaos and political obstacles may prevent a quick solution.

Three potential solutions have been proposed for non-recognition states. First, they can require each same-sex spouse to calculate his or her federal income tax as a single taxpayer by having them prepare a pro-forma federal tax return and using the taxable income as the starting point for his or her income tax return. Second, they can require the LMSSC to add all of their income together and then file separate returns with the income and deductions split 50/50. Third, they could amend their tax law to allow same-sex spouses to file joint returns.

The first alternative would result in extra tax return preparation expenses for couples because they would be required to prepare their federal return as a married couple, and then prepare a separate pro-forma federal return as a single person to file their state returns. This extra burden would likely result in a constitutional challenge because same-sex couples would be required to spend time and money to comply with state law solely because of their gender. This might result in a court overturning such a rule on equal protection grounds.

The second alternative of splitting income down the middle might result in unfair consequences. There are situations, for example, where this procedure might result in a higher total state tax liability. Furthermore, disparities might arise in the event of an audit should the couple divorce. As with the first option, this alternative might also face a constitutional challenge on equal protection grounds.

The third alternative, allowing a same-sex married couple to simply file as married for state tax purposes, would be the most simple solution and the least likely to be found unconstitutional. But this solution would be a tacit recognition of same-sex marriage by the non-recognition state, and so might be politically difficult to get through the legislative process.

The irony for the legislative bodies of non-recognition states is that if they adopt the dual tax return or split-income alternatives, they might be setting the stage for another Supreme Court case that could ultimately overturn all state laws that prohibit the recognition of same-sex marriages. This legislative drama will play out over and over, as the 28 non-recognition states that have a personal income tax struggle to deal with this conundrum.

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