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# DAILY BUSINESS REVIEW

## OPINION & COMMENTARY

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### IRS ruling offers mixed results for same-sex married couples

**Commentary by  
Marvin Kirsner**

The Internal Revenue Service has published much anticipated guidance on the federal tax filing status of lawfully married same-sex couples, ruling that it will treat the couples as married for federal tax purposes, even if they live in a state that does not recognize same-sex marriages — “a non-recognition state.”

As discussed below, couples should consult with their tax advisers promptly to determine the impact of this new guidance on their overall federal tax exposure and whether they can claim a federal tax refund for some prior years.

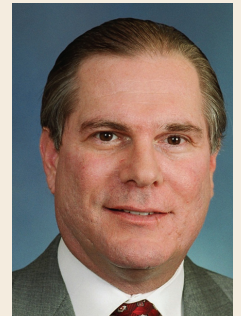
In *Windsor v. U.S.*, the Defense of Marriage Act case, the U.S. Supreme Court in-

validated the federal definition of marriage as only between a man and a woman. The *Windsor* case, however, involved a couple who lived in New York, a state that recognizes same-sex marriages. This raised the question of whether the IRS would allow (or require) lawfully married same-sex couples who live in a non-recognition state, such as Florida, to file as a married couple.

In Revenue Ruling 2013-17, the IRS says that it will treat all lawfully married same-sex couples as married for federal tax purposes, regardless of the state in which they live. Note that this treatment is not optional – such a couple must file as married, even if they live in a non-recognition state. As a result, going forward, same-sex couples living in

Florida must file their federal income tax returns as married taxpayers, either as joint filers or married filing separately. The ruling, however, does give lawfully married same-sex couples the option to file amended returns for open tax years to claim a tax refund if filing as married taxpayers would have resulted in a lower tax liability.

This IRS position will have mixed results for these couples. Some couples will experience a federal tax savings from filing as married taxpayers while others will end up paying more in federal income taxes.



Kirsner

## POTENTIAL TAX SAVINGS

There are areas of significant potential savings for married taxpayers: Lower tax brackets for some married couples, typically where one spouse earns significantly more than the other; a \$500,000 exclusion of profits from the sale of a principal residence, as opposed to a \$250,000 exclusion for a single person; the exclusion of profits on the sale of an asset to a spouse; deduction for the payment of alimony to a former spouse; a \$110,000 alternative minimum tax exemption, as opposed to a \$75,000 exemption for a single person; simplified tax treatment for a business venture between spouses as opposed to more complex partnership tax rules for non-spouses; and a \$110,000 income limit for the child care tax credit, as opposed to a \$75,000 income limit for single persons.

Lawfully married same-sex couples should consult with their tax advisers to determine whether they might be entitled to a refund if any of these beneficial provisions apply to them. The revenue ruling says that they may file for a refund for "open" tax years, which would include the 2010, 2011 and 2012 tax years. It also may include the

2009 tax year for taxpayers who filed on extension less than three years ago.

## POSSIBLE DISADVANTAGES

Some same-sex couples, however, will experience adverse tax consequences by having to file as married taxpayers, including from the following: the "marriage penalty," which usually affects married couples where each spouse has relatively similar earnings, will apply; the wash sale rules will now apply if one spouse sells stock for a loss, followed by a purchase of the same stock by the other spouse, so stock sale losses cannot be generated while still maintaining the same position in the stock; a spouse will not be able to generate a loss by selling property to the other spouse at a loss, because sales between spouses are ignored for federal income tax purposes; and the grantor trust rules will now apply to trusts created by one spouse, where the other spouse is a beneficiary or a trustee, requiring the grantor spouse to report the trust's income.

The new revenue ruling does not require lawfully married same-sex couples to file amended returns for open tax years, so such a couple does not have to file an amended return if it would result in their

paying more in taxes. If a couple decides to file an amended return, however, they will be subject to all of the rules discussed above. So, for example, if a couple files an amended return because one spouse sold a principal residence in 2011 and would benefit from the \$500,000 profit exclusion for a married couple, they need to ensure that they do not trigger one or more of the potential disadvantages of filing a joint return, which could outweigh the benefit of the amended return. Lawfully married same-sex couples will need to review these issues carefully with their tax advisers to make sure that they will not end up owing taxes if they elect to file an amended return.

This new tax landscape will be a Brave New World for some Florida same-sex couples and their tax advisers, who must tread carefully when it comes to tax planning and return preparation.

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