

## The Windsor Case Same-Sex Marriage Ripple Effect

by Louise A. Jackson

In June 2013, the U.S. Supreme Court ruled in the *Windsor* case that the provision in the federal Defense of Marriage Act (DOMA) which required same-sex spouses to be treated as unmarried for purposes of federal law is unconstitutional. On August 30, 2013, the IRS gave us guidance to carry out the implications of the *Windsor* decision in Revenue Ruling 2013-17 along with a new term, “state of celebration.”

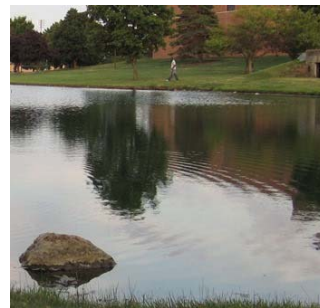
This term refers to the new general rule that the IRS will use in applying the Internal Revenue Code. A couple will be treated as married for purposes of federal taxes if they were legally married in a state, the District of Columbia, a U.S. territory or a foreign country, regardless of the married couple’s state of residence which may be a state that does not recognize same-sex marriages. Some state laws recognize registered domestic partnerships, civil unions or other similar formal relationships. These are not included in the term “marriage,” whether between individuals of the same or opposite sex.

Revenue Ruling 2013-17 reported that there are more than two hundred Internal Revenue Code provisions and related Treasury regulations that include the terms “spouse,” “marriage” (and related terms, such as “marries”), “husband and wife,” “husband” and “wife.” These terms now will be deemed gender neutral.

### Tax Issues

Income tax considerations that have been affected include:

- Filing status;
- “Adjusted gross income” (AGI) floors for medical deductions (10% of AGI), casualty loss deductions (10% of AGI), and miscellaneous deductions floor (2% of AGI);
- Ceilings such as the \$3,000 annual ceiling on the deduction of capital losses; and
- Deductions that are decreased or eliminated based on threshold amounts which primarily impact higher income taxpayers as in the case of itemized deductions, personal exemptions and net investment income surtax, just to name a few.



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The *Windsor* case involved federal estate taxes so they along with gift taxes (spouses have no limits on gifts to each other, for example) are impacted.

### **Employee Benefits**

Keep in mind the *Windsor* case did not change the employer's right to not offer spousal health benefits. But it has changed the tax treatment for such benefits if offered by an employer. Benefits for the non-employee spouse in a same-sex marriage are now excludable from the employee's income as in the case of health insurance coverage which usually was paid for after tax by the employee. Employee benefit plans are likewise impacted. Cafeteria plan benefits now may be provided for the non-employee spouse tax free. Employees' same-sex spouses now may qualify as eligible dependents. Qualified retirement plans now will have to treat legally married same-sex spouses as married for purposes of applying pension law provisions that govern those plans. IRS just touched on these benefits issues in its latest pronouncement and expects to issue more guidance, so stay tuned.

### **Other Federal Laws Impacted As Well**

Guidance similar to the IRS's has been provided by a number of federal agencies pertaining to the treatment of same-sex marriages in carrying out federal laws such as:

- Family and Medical Leave Act (FMLA)
- Medicare
- Immigration

Note that they are not all using the "state of celebration" as the applicable state law. Some are using the state of the employee's residence.

### **Effective Date Is Looming**

The effective date of the IRS ruling is September 16, 2013. Its significance derives from the fact that if a same-sex couple is legally married, that status will apply to all tax situations that matter effective as of that date. For example, if taxpayers' marital status elected for income tax purposes is married filing separately and one spouse itemizes, the other must also itemize his or her deductions for federal income tax purposes.

If there are significant financial pre-2013 transactions taxpayers were involved in and they have not filed their 2012 income tax returns yet, or the applicable statute of limitations is open for some tax years (generally three years from the filing date), it may behoove taxpayers in terms of tax savings to file the 2012 return immediately or file amended returns for open years to obtain such savings, by claiming married filing jointly status or to obtain refunds related to now non-taxable employee benefits.

Note that a same-sex married taxpayer enjoys tax benefits and suffers tax detriments as a result of that status, as with the marriage penalty tax.

### **Employment Relationship**

IRS expects to develop a process for employers to claim refunds related to excess Social Security taxes and Medicare taxes on same-sex spouse benefits that are not non-taxable due to the *Windsor* case. Employers will have to evaluate what changes need to be made in administering qualified retirement plans to recognize same-sex marriages as to benefit entitlements in terms of plan amendments and election forms.

## Unanswered Questions

There are many unanswered questions. Lawyers are scrambling to consider all of the federal laws that may be impacted by the *Windsor* decision. The *Windsor* case did not overrule state laws on marriage. Ohio and Michigan are two states that currently do not recognize same-sex marriages. Some basic unanswered questions:

- How will state income tax returns be impacted?
- Can there be same-sex marriage divorces in states like Ohio and Michigan?
- What is the effective date for changes the *Windsor* case will cause?
- Will Ohio, Michigan and other states that do not recognize same-sex marriages legally entered into in other states be required to recognize them as to persons now resident in their states?
- How will employers operating in both recognition and non-recognition states efficiently carry out their legal responsibilities?

Local nondiscrimination laws in jurisdictions in which an employer operates a facility may force employers located in non-recognition states to recognize same-sex marriages for benefits purposes.

The *Windsor* decision is a perfect example of how one court decision can cause major ripples in U.S. law.

*For information regarding the Windsor case and its effect on taxes, or any other questions about tax law, please contact [Louise A. Jackson](mailto:Louise.A.Jackson@eastmansmith.com) or visit our web site at [www.eastmansmith.com](http://www.eastmansmith.com).*

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