**Same Sex Couple Taxation after**

**Windsor**

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On June 26, 2013 the Supreme Court expanded same sex marriage rights which will have a huge impact on same sex “married” couples as well as their employers. In *United States v. Windsor,* No. 12-307 (June 26, 2013), the Court ruled that Section 2 of the Defense of Marriage Act of 1966 (“DOMA”) which provided that same sex marriage couples would not be recognized for tax purposes was unconstitutional under the equal protection clause. On the same day in *Hollingsworth, et. al., v. Perry,* No 12-44 (June 26, 2013), the Supreme Court held that the Proponents of California’s “Proposition 8” which amended the California State Constitution to provide that only a man and a woman could enter into a marriage, lacked standing to appeal the lower court’s ruling that Proposition 8 is unconstitutional. It should be noted that there have been further attempts by the proponents to stop same sex marriage since the ruling, all of which have failed.

On August 29, 2013 the IRS issued Revenue Ruling 2013-17 which held that same sex couples who are *legally married* in jurisdictions that recognize their marriages will for all purposes be treated as married for tax purposes regardless of where the couple currently lives. In essence this means that the IRS will recognize the “place of celebration” rule, i.e., if the jurisdiction you were married in recognizes same sex marriage, then regardless of where you move to, including a state that does not recognize same sex marriages, for federal purposes you will still be “married”. For example, assume that you recently got married in California after they began doing same sex marriages and moved to Montana where they do not recognize same sex marriages. For federal purposes, the couple would still be deemed married for federal tax purposes and would be entitled to file joint returns after they moved to Montana.

The Ruling set forth that the term “Spouse” for purposes of the entire Internal Revenue Code shall also mean an individual married to a same sex person, provided they are married under any domestic or foreign jurisdiction having the legal authority to sanction marriage. Theoretically this will apply prospectively as of September 16, 2013 for Federal tax purposes. From a same sex couple’s standpoint, this means that for tax returns filed after September 16, 2013 (regardless of whether the return is just on extension, such as for 2012) will have to file as a married couple which means that they can file a joint return or as a married individual filing separate return. For 2012 returns, the couple can choose to file single individual returns or as a married couple. For those years in which the Statute of Limitations has not passed, which is generally 3 years from filing the return, the same sex couple (providing they were legally married at the time) is entitled to file an amended return as a married couple. However, discuss this with your tax advisor to make sure that it is worth the time and expense as filing as a married couple might result in the marriage penalty tax which is nothing more than the fact that a married couple may well pay more tax than if they had not been married and had been able to file two individual returns. There is also the added element of increased chance of audit, and this should also be discussed with your tax advisor.

As married individuals, same sex couples will now be able to benefit or be subject to the marriage penalty as they are now required to file tax returns just as opposite sex couples. Same sex couples will now no longer have to worry about whether anyone is entitled to head of household or being taxed upon dissolution of the marriage as a result of splitting property. Furthermore, alimony may now be treated as a deduction by the payor and includible in income by the payee. From an estate planning standpoint, same sex couples will now be able to take into account that property passing from one spouse to the other is always tax free, assuming both spouses are U.S. citizens. In this regard it is extremely important that same sex couples update their existing estate plans.

On the other hand, domestic partnerships and civil unions are for the most part not equal to marriages and as a result will not be entitled to the benefits of being able to file joint tax returns or the gift and estate tax benefits afforded married couples in general. Thus, in California, domestic partners will still be required to divide income and expenses in filing their returns and will have to files as single individuals. Moreover upon dissolution of the domestic partnership, the tax free treatment provided under the Internal Revenue Code will not apply, nor will a domestic partner be entitled to deduct a payment of alimony. It is imperative that domestic partners go to tax advisors that have a complete understanding of how domestic partners are taxed in California.

As to various government agencies, it is important to look at the agency’s recent rulings. Social security recognizes same sex couple marriages, while the Veterans Administration has yet to do so. In time, it is inevitable that all of the Federal Government departments will recognize same sex marriages, but there is going to be a steep learning curve in the implementation.

As to those States that have not recognized or will not recognize same sex marriages, their days, as suggested by Justice Scalia in his dissent in Windsor may well be very limited. In *Gill v. OPM,* 682 F.3d 1 (1st Cir. 2012), a 3 Judge Panel in the 1st Circuit Court of Appeals held that DOMA was unconstitutional under the equal protection clause. On July 22, 2013 the District Court in Ohio held in the case of *James Obergefell, et. al. vs. John Kaisch*, Case 1:13-cv-00501-TSB (D.C. Ohio July 22, 2013) that the State of Ohio must recognize a valid marriage in another state with respect to same sex couples even if Ohio itself doesn’t permit same sex marriages. Plaintiffs James Obergefell and John Arthur are male Cincinnati residents who had resided together for 20 years. Mr. Arthur was dying of ALS. Plaintiffs ’ rented a plane, flew to Maryland and were married on the tarmac. They then flew back to Cincinnati**.** The Ohio laws and Constitution expressly prohibit same sex marriages. Nonetheless the Court found that the law under Windsor violated the Equal Protection Clause and thus must fall. In addition they noted that Ohio, with the exception of same sex marriages, will recognize a valid marriage in another State even if it would not have been recognized had it occurred in Ohio. Ohio does not authorize marriages between first cousins. However, it will recognize those marriages if the marriage was performed in a jurisdiction where it is legal, such as Michigan or Georgia.

The Plaintiffs in this case had wanted a Court order declaring the law forbidding recognition of legal same sex marriages from other states and requiring the Registrar of Ohio death certificates to declare Mr. Arthur as “married” and to record James Obergefell as his “surviving spouse” at the time of Mr. Arthur’s death. The Court determined that Plaintiff would be irreparably harmed and as “Scalia” predicted, would nullify State’s laws banning same sex marriages. There are cases pending in a number of courts now with similar issues and it is expected that as a result of Windsor, many states’ laws prohibiting same sex marriage will be deemed unconstitutional.

If you are an employer, both the cases and the Revenue Ruling will also result in changes to your payroll systems and changes as to how you administer certain employee benefits. The ruling expressly provides that all employers must take the following prospective actions: (1) recognize same sex spouses for payroll purposes, including with respect to the taxation of employer-provided health coverage and other fringe benefits and (2) must provide same sex married individuals with the same rights opposite sex married individuals are afforded with respect retirement benefits, including death benefits and qualified joint and survivor annuity requirements.

Although the ruling did not discuss whether employers are required to take any retroactive actions for tax and benefit treatment of same-sex marriages prior to September 16, 2013, they may want to discuss with their tax advisor whether they should take certain steps now to preserve their rights to a refund of any excess FICA and Medicare tax with respect to taxes withheld for various employee benefits for the same sex couple’s other spouse.