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Federal and Ohio tax implications of Windsor for same-sex couples

By Kevin V. Simon

In a 5-4 decision, the Supreme Court on June 26 held in *U.S. v. Windsor*¹ that Section 3 of the federal Defense of Marriage Act² (DOMA) is unconstitutional under the equal protection clause of the Fifth Amendment.

Section 3 of DOMA defined “marriage” as a legal union between one man and one woman as husband and wife and “spouse” as a person of the opposite sex who is a husband or wife. However, the court emphasized that its holding is confined to marriages legally recognized by a state and does not apply to civil unions or legal domestic partnerships. Further, the court did not address the constitutionality of Section 2 of DOMA, which allows a state that does not recognize same-sex marriages to disregard a lawful same-sex marriage performed in another state that does recognize such marriages. *Windsor* will produce significant changes in the federal taxation of same-sex couples. Its effect in Ohio is less certain.

Federal tax implications

In response to *Windsor*, the IRS on Aug. 29 issued Revenue Ruling 2013-17³. The ruling provides that legally married same-sex couples, regardless of where they live, will be treated as married for all federal tax purposes under the Internal Revenue Code. The issue is important, as the Government Accountability Office reports that there are almost 200 provisions of the code that are effected by marital status.

As a result, legally married same-sex spouses now qualify for tax benefits previously available only to opposite-sex spouses. The ruling applies prospectively as of Sept. 16. Based on the ruling, legally married same-sex couples must now file either as married filing jointly or separately.⁴ In addition, legally married same-sex couples may choose to file an amended return for a refund claim for tax years that remain open under the statute of limitations (i.e., 2010 and beyond). It must be noted that “married” filing status may be advantageous or detrimental for federal tax purposes, depending on individual facts.

While the ruling is significant and provides needed certainty for same-sex spouses, many questions remain to be addressed, such as whether *Windsor* will be applied retroactively and how employers should administer benefit plans. The ruling provides that the IRS intends to issue further guidance, and an IRS speaker recently indicated that this issue is a priority for the service.⁵

Windsor in Ohio

Ohio is one of 37 states that do not recognize same-sex marriages.⁶ In Ohio, same-sex marriages are prohibited by both statute and constitutional amendment. Because *Windsor* did not address Section 2 of DOMA, Ohio is not required to recognize legally married same-sex spouses for purposes of Ohio tax laws, and, as a result, such spouses do not qualify for tax benefits provided under Ohio law.

However, in *Obergefell v. Kasich*, the Federal District Court for the Southern District of Ohio granted a temporary restraining order in favor of a same-sex couple to force Ohio to recognize their



TAKEAWAYS

- ▶ The IRS issued a ruling that provides that legally married same-sex couples, regardless of where they live, will be treated as married for all federal tax purposes under the Internal Revenue Code.
- ▶ Many questions remain to be addressed, such as whether the decision will be applied retroactively and how employers should administer benefit plans.
- ▶ The impact of the decision in Ohio remains to be determined, but for now Ohio is not required to recognize legally married same-sex spouses for purposes of Ohio tax laws.
- ▶ Tax advisors should:
 - Talk with their clients to determine if the newly available marital status produces tax savings and refund claims are warranted.
 - Discuss the implications with employers, as benefit plans might need to be revised.

LEARNING OPPORTUNITIES

Local Firm Management - Dealing With the IRS and Collections

Jan. 7 | Beachwood | Course #44458

Join your peers in the Cleveland area for this discussion, just in time for tax season. You'll learn about common issues in tax collection and how the IRS handles different types of collections disputes.

Southwest Ohio Tax Update

Jan. 9 | Fairfield | Course #45485

Make sure you have the latest education and insights to help you tackle challenges in the New Year. This conference features sessions on the latest in tax, A&A, fraud and more. Close to home and featuring recognized experts, the Southwest Ohio Tax Update offers the CPE you need to be successful.

Repair Regulations

OSCPA On-Demand | Webcast | Course #46115

Join Lynn Nichols, CPA for this on-demand course that will get you up to speed on the IRS' newly released Final Regulations. These regulations will require a reappraisal of the way in which taxpayers claim repair costs. Make sure you are informed of the changes to better serve your clients.

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marriage that was lawfully performed in Maryland for purposes of the issuance of a death certificate for the spouse who was gravely ill. The impact of this decision is unclear for two reasons: First, as noted above, the court's decision extended *Windsor* beyond the holding of the Supreme Court, which declined to address this issue. Second, the court's decision granted injunctive relief to the spouses rather than reach a decision on the merits. Whether *Obergefell* is a proper extension of *Windsor* will likely be decided through future litigation.

Conclusion

The *Windsor* decision provides significant new federal tax opportunities to legally married same-sex couples. Tax advisors should review these opportunities with their clients to determine if the newly available marital status produces tax savings and refund claims are warranted. Tax advisors should likewise discuss the implications of *Windsor* with employers, as benefit plans might need to be revised. However, the impact of *Windsor* in Ohio remains to be determined as the issue is further analyzed administratively and by the courts.

¹ 133 S. Ct. 2675 (2013).

² 1 U.S.C. section 7 and 28 U.S.C. section 1738C.

³ 2013-38 IRB 201.

⁴ These couples must also file as married for an original return for the 2012 tax year filed after September 16, 2013.

⁵ Comments of Service Agent Erick Slack before District of Columbia Bar Taxation Section's Employee Benefits Committee, October 24, 2013.

⁶ Same-sex marriages are legally permitted in California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington. In addition, same-sex marriages are legally permitted in the District of Columbia.