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Estate Planning Opportunities Arising from Recent Revenue Ruling Concerning Marriages of Same-Sex Couples

Revenue Ruling 2013-17

On August 29, 2013, the US Department of the Treasury (“Treasury”) and the Internal Revenue Service (IRS) issued Revenue Ruling 2013-17 (the “Ruling”) holding that, for purposes of administering all federal tax laws including those pertaining to income, gift and estate taxes, married same-sex couples that were lawfully married in any jurisdiction (domestic or international) will be treated as married regardless of whether the jurisdictions in which such couples are resident and/or domiciled recognize the marriage. However, neither the Treasury nor the IRS will recognize as married those unmarried same-sex couples that are in so-called “marriage equivalent” legal relationships, e.g., civil unions, registered domestic partnerships and domestic partnerships.

As Treasury Secretary Jacob J. Lew stated in a press release, the Ruling “provides certainty and clear, coherent tax filing guidance for all legally married same-sex couples nationwide. It provides access to benefits, responsibilities and protections under federal tax law that all Americans deserve.” The Ruling “also assures legally married same-sex couples that they can move freely throughout the country knowing that their federal filing status will not change.” The Ruling “applies to all federal tax provisions where marriage is a factor, including filing status, claiming personal and dependency exemptions, taking the standard deduction, employee benefits, contributing to an IRA, and claiming the earned income tax credit or child tax credit.”

As a result of the Ruling, married same-sex couples generally will be required to file their 2013 federal income tax returns with a “married filing jointly” or “married filing separately” filing status. In addition, same-sex couples who were married in prior years may, but are not required to, file original or amended tax returns within the statutory limitations period, which is ordinarily three years from the date the tax return was originally due or filed (if on extension) or two years from the date the tax was paid, whichever is later. Accordingly, married same-sex couples ordinarily may amend their returns for the years 2010, 2011 and 2012 and obtain a refund of any overpayment of taxes, if applicable. Taxpayers with special situations (e.g., those that filed protective claims for refunds or that signed tolling agreements with the IRS) may be able to amend their returns for 2009 and/or prior years as well.

The Ruling comes in the wake of the June 26, 2013 US Supreme Court (the “Supreme Court”) decision striking down Section 3 of the federal Defense of Marriage Act (DOMA) as unconstitutional, thus requiring the federal government to recognize marriages between same-sex couples, in the case of *United States v. Windsor* (“*Windsor*”). The Ruling is a broad implementation of *Windsor*, though many specific tax-related issues remain to be addressed. For example, the Treasury and the IRS plan to issue future guidance regarding payroll taxes on health insurance and fringe benefits provided to same-sex spouses as well as the treatment of same-sex spouses under tax-favored cafeteria plans and qualified retirement plans.

Related Guidance from Other Federal Agencies

A handful of other federal agencies have issued their own guidance on various non-tax issues in the wake of *Windsor*, but have taken contrasting positions on whether they will follow the “place of celebration” rule, i.e., by referring to the law of the jurisdiction where the marriage took place, as the Treasury and the IRS have done, or the “place of domicile” rule, i.e., by referring to the law of the jurisdiction in which the couple is resident and/or domiciled, in determining whether married same-

sex couples should be treated as “married” under federal law. Some agencies have indicated that they will follow the “place of celebration” rule, including the Office of Personnel and Management (spousal benefits for federal employees), the US Department of Health and Human Services (Medicare eligibility for certain services) and the US Department of Homeland Security (immigration visas). Other agencies have indicated that they will follow the “place of domicile” rule, including the Social Security Administration (spousal social security benefits) and the US Department of Labor (family and medical leave). In accord with the Treasury and the IRS, none of the above agencies have indicated that they will recognize marriage equivalent relationships. Still more federal agencies are expected to issue their own guidance implementing *Windsor* in the future. However, it is too soon to predict which of such agencies will follow the “place of celebration” rule or the “place of domicile” rule or whether any such agencies will recognize marriage equivalent relationships for purposes of determining which same-sex couples will be entitled to the more than 1,000 benefits, responsibilities and protections applicable to married opposite-sex couples under federal law.

Estate Planning Opportunities Arising from the Ruling

The June 28, 2013 advisory [“Estate Planning Opportunities Arising from Recent, Landmark Supreme Court Decisions Concerning Marriages of Same-Sex Couples”](#) (the “Windsor/Perry Advisory”) outlined a number of estate planning opportunities arising from the *Windsor* decision as well as the related case of *Hollingsworth v. Perry*, where the Supreme Court struck down California’s Proposition 8 (which overturned marriages of same-sex couples in California) as unconstitutional, thus requiring California (but not any other states) to recognize marriages of same-sex couples. In light of the Ruling and the guidance issued by other federal agencies as described above, the estate planning opportunities discussed in the Windsor/Perry Advisory remain applicable to married same-sex couples, including the following:

1. Review and revise estate planning documents to take advantage of the unlimited marital deduction under federal gift tax and estate tax laws.
2. Review and revise retirement account beneficiary designations and joint and survivor annuity elections to ensure that they remain appropriate.
3. Consider replacing individual life insurance policies with survivor policies in order to optimize death benefits.
4. Consider splitting gifts between spouses in order to maximize each spouse’s applicable exclusion amount from federal gift tax and/or estate tax (the “Applicable Exclusion Amount”).
5. Amend previously filed federal estate, gift and income tax returns and/or file protective claims as appropriate in order to obtain tax refunds and/or reclaim one or both spouses’ Applicable Exclusion Amount.
6. Move to a state that recognizes marriages of same-sex couples in order to obtain all of the federal non-tax benefits currently available to married same-sex couples.
7. Non-citizen spouses should consider seeking permanent residency and/or becoming citizens.

Please refer to the [Windsor/Perry Advisory](#) for more detailed information concerning the above estate planning opportunities. Married same-sex couples should consult with their advisors in light of their particular facts and circumstances in order to take maximum advantage of the Ruling and related guidance from other federal agencies. In light of the potential tax and non-tax benefits, responsibilities and protections now applicable to married same-sex couples under federal law, unmarried same-sex couples should consider whether to marry.

We Can Help

For more information, please contact your Katten Muchin Rosenman LLP attorney, or any member of Katten's Trusts and Estates practice.



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