

# Tax changes for same-sex couples after DOMA decision

By Arnold Sherman

In a highly-anticipated decision, the Supreme Court struck down Section 3 of the Defense of Marriage Act (DOMA) in a case titled *United States v. Windsor*. That decision opens the door for same-sex couples to benefit from tax and other federal benefits previously reserved for heterosexual couples.

By way of background, in 1996 Congress enacted and President Clinton signed into law DOMA, Section 3 of which defines marriage, for purposes of administering federal law, as the “legal union between one man and one woman as husband and wife.” That section goes on to define “spouse” as “a person of the opposite sex who is a husband or wife”.

Justice Kennedy, writing for the majority in the recent 5-4 decision, said that Section 3 “is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom [New York] State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, [DOMA] is in violation of the Fifth Amendment.”

The decision that DOMA is unconstitutional affords same-sex married couples living in states that recognize same-sex marriage the same benefits under federal law as heterosexual couples. The majority’s opinion noted that the construction of over one thousand federal laws is subject to the definition of “marriage” and “spouse.”

Here are just some of the **tax benefits** that may be available to legally married same-sex couples:

- The right to file a joint income tax return, which can produce a lower combined tax than the total tax paid by the same-sex spouses filing as single persons. NOTE: This can also produce a higher tax because of the so-called marriage penalty, especially if both spouses are relatively high earners)
- The opportunity to receive tax-free employer health coverage for the same-sex spouse
- The chance for either spouse to utilize the marital deduction to transfer unlimited amounts during his or her lifetime to the other spouse free of gift tax
- The opportunity for the estate of the first spouse to die to secure a marital deduction for amounts transferred to the surviving spouse
- The estate of the first spouse to die to have the right to transfer the deceased spouse’s unused estate tax exclusion amount to the surviving spouse
- The opportunity to make “split” gifts (i.e., gifts to others treated as if made one-half by each spouse)
- The prospect of a surviving spouse to stretch out distributions from a qualified retirement plan or IRA after the death of the first spouse under more favorable rules than apply for nonspousal beneficiaries

Many other tax provisions are also affected by a taxpayer’s marriage status, such as the deductibility of alimony paid to a spouse or former spouse and the availability of the innocent spouse protection. Such federal benefits as Social Security and Veteran benefits are also now available to same-sex couples.

This decision also offers a benefit to employers not to be overlooked. Employers that currently “gross up” an employee’s salary to compensate the employee for the added cost of having a same-sex partner on the employee’s healthcare plan will have, as a result of this opinion, fewer employees whose salary needs to be adjusted.

Notwithstanding its significance, however, this decision is not the end of the story. Section 2 of DOMA, for example, which allows states to refuse to recognize same-sex marriages performed under the laws of other states, was not challenged in this case. As a result, we do not know at this time how the decision will be applied to same-sex couples married in a state that recognizes same-sex marriage, but that are *living* in a state that does not recognize such marriage. To further complicate the landscape, some federal

agencies, including the IRS and the Veterans Administration, recognize marriage according to the state where a couple is domiciled while others, such as INS, acknowledge marriage based on the state where the marriage occurred. This could result in the availability of federal benefits to same-sex couples being determined on an agency-by-agency basis. It is also unclear what effect, if any, this decision will have in states that only have domestic partnerships or civil unions. The majority's "lawful marriages" language may prove detrimental to those who claim that these arrangements are essentially equal to marriage.

Although one might logically assume that the consequences of declaring a law unconstitutional is that it should not have been applied from the date it was adopted into law, the retroactive application of this decision is a complicated, and at this time, an unanswered question. Because of the murkiness of retroactivity, married same-sex couples who filed separate federal income tax returns because of DOMA should consider filing amended returns with claims for refund, where applicable. Along similar lines, the personal representative of an estate of a deceased same-sex married person should consider filing (and may even have a fiduciary duty to file) an amended estate tax return claiming a marital deduction and the corresponding estate tax refund to the extent of the value of assets transferred to the surviving same-sex spouse. And same-sex couples in state-sanctioned domestic partnerships or civil unions may want to consider filing protective refund claims in case this decision is deemed to include these arrangements.

We anticipate the federal government, including the IRS, will issue procedures to address at least some of the many unanswered questions. In addition, we expect that this decision will invite litigation that may provide further clarification for some of these issues. As this story unfolds, we will try to keep you "in the loop."