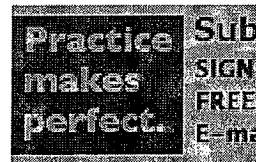


MASSACHUSETTS LAWYERS WEEKLY

www.masslawyersweekly.com



Wednesday, July 12, 2006

Lawy

[Try It Free](#) | [Subscriber Services](#) | [Our Newspapers](#) | [Other Products](#) | [Advertise](#) | [Help](#)

From the June 28, 2004 Massachusetts Lawyers Weekly.

| | | | |
|--|---|---|--|
| DISCUSS Story on our Forum | SUBMIT a Letter to the Editor | Order a REPRINT of this Story | |
|--|---|---|--|

Trusts & Estates

Same-Sex Married Couples & Taxes: Recent Developments

By Jeffrey A. Baskies

On May 27, the Department of Revenue issued a draft of a Technical Information Release (TIR) on the Massachusetts tax issues associated with same-sex marriages.

Reading the TIR reveals a few common themes of which attorneys with same-sex couple clients should be aware:

ADVERTISEMENT



Get client newsletters tailored to your practice areas!

[Click here for more information.](#)

* One of the "benefits" of marriage appears to be a complex and burdensome set of rules that might well cause excess work on the returns of same-sex married couples. The separate treatment will undoubtedly be a sore spot for clients, and it will also create complex and unique tax computations and recalculations for same-sex married couples.

* A few of the so-called "marriage penalties" (which traditional married couples have complained about for years) will also negatively impact same-sex married couples on their Massachusetts returns.

* There will still be some difficult issues for same-sex married couples on their federal returns.

'Goodridge'

As much of the world now knows, the Supreme Judicial Court's landmark decision in *Goodridge, et al. v. Department of Public Health*, 440 Mass. 309 (2003), recognized the rights of same-sex couples to marry in the commonwealth as of May 17.

Since that date, hundreds of same-sex couples have availed themselves of this opportunity to wed and many more will do so in the future.

For state income tax purposes, same-sex spouses must now file as "married persons" — they can either file a joint return or separately ("married but filing separately") for Massachusetts income tax purposes.

As stated in the TIR, "Massachusetts construes the term civil marriage 'to mean the voluntary union of two persons as spouses' ... Thus the term 'marriage' includes same-sex marriage, and the term 'spouse' includes partners in a same-sex marriage."

However, for federal income tax purposes, the definitions of "marriage" and "spouse" were developed in the Federal Defense of Marriage Act of 1996 (DOMA), which states in part:

"In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." Pub. L. 104-199, sec 1, 100 Stat. 2419 (Sep. 21, 1996) codified at 1 U.S.C. Sect. 7 (2004).

When advising same-sex married couples on income tax planning, this dichotomy between state tax treatment (recognizing the couple as married) and federal tax treatment (not recognizing the couple as married) is the central issue.

As an aside, some clients will probably be interested in challenging the constitutionality of the federal DOMA (indeed, it seems likely a couple or a class will challenge it under the Equal Protection clause or some other argument), so it may be worth advising clients that suit is a possibility.

For clients not interested in challenging the law but looking for advice on planning assuming DOMA applies, there are some fundamental issues to consider.

Massachusetts Filing Requirements

The first issue to contemplate is that, while a Massachusetts income tax return must be filed either jointly or as married filing separately, a joint federal income tax return (Form 1040) would be barred by DOMA. So, it appears two individual federal returns must be filed — either as single filers or as head of household (although, it appears only one spouse could claim such).

The recent TIR points out, however, that while same-sex spouses can file as head of household federally, they generally cannot for their state income taxes. That is due to the link between the Massachusetts rule and the federal definition of head of household.

Massachusetts derives its definition of head of household from the federal law, and the federal law only allows the status for unmarried filers. Hence, married same-sex couples now lose this opportunity under Massachusetts law.

Second, same-sex couples filing joint Massachusetts returns must combine their total dependents from their two federal returns to create their joint Massachusetts return.

Third, same-sex couples will have to recalculate their unreimbursed medical/dental expenses and will potentially lose some of those deductions. Section 213 of the Internal Revenue Code allows a deduction for unreimbursed medical, dental and other related expenses to the extent they exceed a certain threshold — 7.5 percent of adjusted gross income (AGI).

Mechanically, the same-sex couple will combine their section 213 deductions and their AGIs and recalculate to see if the deduction is available.

The Massachusetts recalculation may hurt same-sex couples the way it has hurt traditional

couples in the past. For individual filers with significant unreimbursed expenses and low enough AGI to be able to take the deduction (e.g., one spouse earning much less than the other but incurring the lion's share of the expenses), the recalculation on the Massachusetts return may cause them to lose the benefit of part or all of that deduction.

Fourth, federal section 162 deductions for unreimbursed trade or business expenses and certain itemized miscellaneous deductions will be treated similarly to the section 213 deductions. Section 162 deductions are allowed to the extent that they exceed 2 percent of AGI.

Again, same-sex joint filers will have to combine their deductions, combine their AGIs and recalculate to see if the deductions will be available or lost.

Fifth, Massachusetts allows the federal interest on education loans deduction, but the federal deduction phases out based on modified AGI. As a result, same-sex joint filers will need to combine their incomes and recalculate as though they were filing a joint federal form 1040.

Sixth, one of the biggest complaints about "marriage penalties" comes in the area of passive activity losses (PALs) from rental real estate. The problem is the federal deduction for PALs favors single taxpayers by providing the same offset limits and AGI threshold reducing the offset limitation to married and single filers. Thus, two individual filers are eligible for twice the tax benefit compared to a married couple.

While same-sex couples will still be filing as individuals federally (and thus benefiting from this PAL treatment), on their Massachusetts joint return the TIR forces them to recalculate their PAL losses for Massachusetts taxes as if they filed a joint federal return. Thus, the benefit will be lost.

Taken as a whole, same-sex couples may actually save money on their taxes compared to traditional couples. They will still get the "benefit" on their federal returns of being treated as individuals. Thus the marriage penalties that currently exist in the federal tax code will not hurt them.

However, for Massachusetts purposes, they will essentially be treated as if they filed a joint federal return and will suffer the same "marriage penalties" as traditional couples.

Ultimately, the dichotomy in tax treatment may economically benefit same-sex couples, but it will also require them to continue being treated "unequally" in the law and will undoubtedly add wrinkles to their tax planning and tax returns that traditional couples never have to consider.

Unanswered Question

It is not up to the TIR to resolve federal issues, but at least one federal income tax issue still remains.

If a federal tax credit is afforded to taxpayers for state income taxes paid, then how will a same-sex couple allocate their Massachusetts joint tax liability?

For individuals filing individually in Massachusetts and federally, or for married couples filing jointly in the commonwealth and federally, the issue is moot. But how will the credit be handled in a situation with a joint Massachusetts tax return and then two federal income tax returns?

Should the couple equally split the state tax credit or apportion it based on contribution? Apportionment is probably the fairer approach, but is there a law that clearly says that is the right thing to do?

Headache For Employers

Another issue exists that will create confusion for employers.

Employer-provided health insurance benefits when extended to spouses are excluded from federal gross income. Thus, if you are covered on a work health insurance plan and your spouse and children are too, then the part paid by your employer is not treated as taxable income to you.

On the other hand, for same-sex couples, the fair market value of the coverage will be taxable income for federal income taxes. Alone, that's not such a cumbersome deal for employers, as the issue existed before. But what will be a problem is that for Massachusetts income tax purposes, now, the same-sex spouse's coverage should be excluded from gross income.

Generally, income is subject to withholding for Massachusetts taxes if it is taxable under Massachusetts income tax law. Now, the value of the coverage of a same-sex spouse will not be taxed under Massachusetts law.

Thus, the fair market value of the benefit shouldn't be subject to Massachusetts withholding either (although it will be subject to federal withholding). These calculations may be very tricky for employers.

Conclusion

Obviously, the *Goodridge* decision and same-sex marriages significantly impact income tax planning issues for same-sex married couples. All same-sex couples that marry will need to pay closer attention to their income tax returns — at least this year.

And the differential treatment in the federal and state tax codes may create new and unique opportunities for same-sex couples to maximize their deductions and minimize the "marriage penalty." Same-sex couples and their planners should keep that in mind.

Attorney Jeffrey A. Baskies, who practiced estate planning in Florida for many years, is currently the CEO of Lawyers Weekly Inc. in Boston. Board certified emeritus as a specialist in wills, estates and trusts law by the Florida bar, he writes a column on estate planning that runs regularly in Lawyers Weekly USA, the national newspaper for small law firms. Questions or comments may be directed to jbaskies@lawyersweekly.com.

© 2004 Lawyers Weekly Inc., All Rights Reserved.

| | | | |
|----------------------------|-------------------------------|-------------------------------|--|
| DISCUSS Story on our Forum | SUBMIT a Letter to the Editor | Order a REPRINT of this Story | |
|----------------------------|-------------------------------|-------------------------------|--|



[User Agreement For Subscriber-Only Online Benefits](#) | [Help](#) | [Our Privacy Policy](#)
Send any questions or comments to comments@lawyersweekly.com

Subscriber Services: 1-800-451-9998 **Technical Support:** 1-800-444-5297 ext. 8156

© Copyright 2006 Lawyers Weekly, Inc. All Rights Reserved



Lawyers Weekly does not use spyware; however, we link to a number of other sites and do not take responsibility for any spyware they i

This site is best viewed with Internet Explorer 6 ([click here to download](#)) or Netscape 7 or higher ([click here to download](#))

208.49.101.98/5.93