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## My View: Court's DOMA decision impacts income tax planning

*By Marvin A. Kirsner*  
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Last week's Supreme Court decision in *U.S. v Windsor* striking down a key provision of the Defense of Marriage Act sent shock waves through the national tax community. But tax professionals in Florida will have a more difficult time navigating the impacts of this ruling than those in other states that officially recognize same-sex marriages.

The DOMA provision that was struck down defines marriage for federal law purposes as a union between a man and a woman. In the *Windsor* case, the Internal Revenue Service used this definition to disallow the marital estate tax deduction to the taxpayer. The Court ruled last week that because New York recognized same-sex marriages, DOMA's definition of marriage as limited to a union between a man and a woman was unconstitutional. The IRS has historically used DOMA's definition of marriage to prohibit same-sex married couples from filing joint income tax returns and prevent them from enjoying retirement plan benefits and employment-related benefits such as tax-free health benefits.

The critical question for tax advisors to address — whether same-sex married couples should file joint federal income tax returns. In many cases, this will result in a reduced tax liability. In some situations, same-sex married couples might be entitled to tax refunds if they file amended tax returns as a married couple filing jointly. There are many situations where filing jointly may benefit a couple. For example, a taxpayer who files as a single person can exclude \$250,000 of gain on the sale of a primary residence. However, married couples filing jointly can exclude \$500,000 in gains, saving up to \$119,000 in taxes, twice the tax savings versus if they had filed separate returns. As another example, if one spouse has a \$100,000 gain from the sale of stock, and the other spouse has \$100,000 in stock losses, the couple would be able to offset the losses against the gains by filing a joint return. But that would not be allowed if they filed separate returns.

The catch: It's unclear from the Supreme Court's decision if the IRS will consider as "married" same-sex couples legally married in states like New York that recognize such marriages, but living in a state like Florida that does not. This is because the court's decision dealt with a situation where the taxpayer resided in a state that recognizes same-sex marriages. Will the IRS agree that Florida same-sex couples are married if the state does not recognize such unions as marriage? Justice Scalia raised this question in his dissenting opinion.

There is a precedent for the IRS to recognize same-sex marriages for federal tax purposes. In 1958, the IRS agreed to recognize the validity of a common-law marriage for federal income tax purposes if the law of the state would treat the couple as husband and wife. The ruling also says if the couple entered into a common-law marriage in a state that recognizes such marriages, they will continue to be treated as married for federal income tax purposes even if the couple moves to a state that does not recognize common-law marriages. This situation seems very similar to a same-sex couple who is legally married in a state that recognizes same-sex marriages, but resides in a state that does not. While we wait for guidance from the IRS on this issue, the 1958 ruling may give same-sex married couples living in Florida hope that the IRS will treat them as married couples for tax purposes.

In the meantime, same-sex married couples should consult qualified tax advisors to determine whether they may be entitled to refunds by filing amended returns jointly. The general rule is that a return can be amended up to three years from the date it was filed. Remember, in many cases, married couples might pay more in income taxes due to the "marriage penalty." If same-sex couples in Florida are treated by the IRS as married, they might someday encounter a rather unpleasant surprise: a notice from the IRS that they owe more taxes as a result of this Supreme Court decision. With tax law, as with marriage, you must take the good with the bad.

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