IRS Ruling on Same-Sex Marriage and Six Impossible Things Before Breakfast

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On Thursday, August 29, the IRS released Revenue Ruling 2013-17, announcing that it would consider all legally married same sex couples as married for federal tax purposes, even if the couple was domiciled in a state that does not recognize the marriage. The IRS announcement is not surprising. It is in line with every other federal agency that has announced its position on recognition of marriages between same-sex spouses, that is, every federal agency that has been free to choose a "place of celebration" rule rather than a "place of domicile" rule. Some agencies, e.g., Social Security, have statutes or regulations in place that may restrict their ability to adopt a place of celebration rule. (Note: Social Security has not yet announced its official position as to which marriages will count for purposes of spousal benefits.)

The celebration rule is also much easier to apply than a domicile-based rule would be. Imagine a couple's marital status for tax purposes changing from year to year based on where the spouses lived. And how would large employers keep track of its same-sex married employees for purposes of taxing the benefits extended to their spouses? If an employee moved from DC to Virginia mid-year would such an employer be expected to reclassify the spousal benefits as taxable income? It makes much better sense to apply a rule like "place of celebration" which is easier to administer over time.

The federal rule will create some difficulty for those states who insist on continuing to ignore the marriages of their lesbian and gay residents. If the state has an income tax that is based on federal tax law (as most states do) then they will have to change the rules that require state filing status to match federal filing status. And they will have to develop a procedure for continuing to base the state return on the information filed in a federal return even though at the state level the taxpayers will be filing single and the federal return will be filed as married. Marriage equality states have dealt with a similar problem for years. The solution has been to require the taxpayers to fill out a mock or dummy federal return (joint return or MFS) that could serve as the basis for the joint state return. Now, in reverse fashion, states like Virginia and Georgia will likely require their same-sex spouses to fill out two mock federal returns as if they were single and base the state returns on the mock federal ones. It takes some extra work on the part of the state to maintain its position of inequality. Some states, those without far-reaching state constitutional DOMAs of their own, are likely to simply allow joint filing at the state level. Some may even respond to this federal nudge and go ahead and extend marriage equality to their residents. (I'm thinking Illinois, maybe Hawaii). But even in strong DOMA states (like Virginia and Utah), the state tax authorities have informally announced that until state law is changed they will continue to follow the rule that couples who file jointly at the federal level must file jointly at the state level. Maybe the IRS has just paved the way to marriage equality for the entire country!

The IRS also announced in the ruling, in keeping with other agencies, that couples in registered domestic partnerships (RDPs) or civil unions (CUPs) would not be treated as spouses. This rule affects couples in the seven states and the District of Columbia, where registered partners or partners in a civil union have all the same rights and responsibilities as spouses. As with the celebration rule, this position on RDPs and CUPs is not surprising. It is clear that the federal government wishes to apply as uniform a rule as possible and so the IRS is following the lead of other agencies (e.g., Office of Personnel Management). But I do think this position is a bit messier for tax law than for agencies that are only concerned about providing spousal benefits to federal employees. Spousal status is relevant to hundreds of tax rules. For example, RDP dissolutions are mirror images of divorces and involve division of marital property and payments of alimony. The divorce tax statutes, however, by their terms only apply to spouses. And so RDPs and Civil Union partners are left with no clarity as to how their “divorces” will be taxed. Does this mean that family lawyers should advise their RDPs who are in the midst of dissolving their partnerships to go get married so they can “divorce?” In that case, they will at least know what tax rules will be applied to their dissolution transactions. Or, would this be a sham marriage?

Many activists in the LGBT civil rights movement applaud the IRS decision not to include RDPs and Civil Union partners in the definition of spouse. I agree with their rationale that the position will push some states toward marriage equality. It is more difficult to argue in a state like New Jersey that civil unions provide sufficient equality to marriage under the New Jersey state constitution because now, as it turns out, married couples get federal benefits and civil union partners do not. But the Obama administration argued in the marriage equality case from California (the *Perry* case, regarding the constitutionality of Proposition 8) that it was a violation of equal protection for states to provide all the same benefits and responsibilities of marriage through RDP and Civil Union status without going the next step and providing marriage. It seems to me that the same equal protection argument should apply to the IRS as to whether it should recognize RDP and Civil Union status as the same as marital status for purposes of applying the Internal Revenue Code. Does the IRS really want states to have the authority to provide a way for couples within their borders to “check the box” for income tax purposes? Check marriage and the federal marriage tax rules apply. Check RDP and the marriage rules of the state apply but not the federal marriage tax rules. I feel as though I just walked through the Looking Glass.