TAX LAW

# Tax Consequences of the Marriage Equality Act

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The Marriage Equality Act (hereinafter referred to as "the Act") was signed into law on July 24, 2011 as Chapters 95 and 96 of the Laws of 2011. The purpose of the Act is to provide equal treatment, under the laws of New York State, to married couples, whether of the same-sex or different-sex. It applies to all legally performed marriages whether or not they are performed in New York State.

In addition to the much publicized impact on other areas of the law, the Act will play a major role in New York State personal income taxation as well as having a significant effect on state estate taxation. In response to many questions that arose soon after the enactment of the new law, the New York State Department of Taxation and Finance recently issued two Technical Memorandums (TSB-M-11(8)C and TSB-M-11(9)M) that provide guidance in these areas.

The pronouncements provide information regarding the New York State tax impact of the Act. Generally for income and estate tax purposes the Internal Revenue Code looks to state law to determine marital status. Congress, in 1996, adopted the Federal Defense of Marriage Act, which defines marriage, for federal tax purposes, as the union between a man and a woman. As a result, same sex marriages are not recognized for any Federal Tax purposes.

## Effect of the Marriage Equality Act on NYS Personal Income Taxation

All same-sex married couples must file their 2011 New York State personal income tax returns as married. As such, they must either file as married filing jointly or married filing separately. Because their federal returns will be filed using an unmarried filing status (head of household or single), in order to compute their New York State income tax the couple must recompute their federal returns as if they were married for federal tax purposes. While not specifically required by the TSB issued by the Tax Department, it appears that the couple would be required to attach to their New York State return a copy of a "pro-forma" federal return using the married filing status to compute their tax.

The Act is effective for tax years ending on or after July 24, 2011. If the couple is married on December 31, 2011 they are treated as if they have been married for the entire year. However, the Act is not retroactive. Therefore, if a same-sex couple was legally married in another state, prior to 2011, they cannot recompute their prior years New York State income tax returns because they are not considered married, for New York State purposes, before July 24, 2011.

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## Effect of the Marriage Equality Act on NYS Estate Taxation

The New York taxable estate, of an individual with a surviving same-sex spouse, must be computed in the same manner as if the individual were married for federal estate tax purposes. This provision applies to the estate of a decedent who died on or after July 24, 2011.

An estate may claim a marital deduction, under §2056 of the Internal Revenue Code, and may also make a Qualified Terminable Interest Property (QTIP) election for property passing to the same-sex spouse or a trust for the benefit of such spouse, as if they were married for federal estate tax purposes.

The TSB specifically requires the preparation of a "pro-forma" federal estate tax return that must be attached to the ET-706 (New York State Estate Tax Return). If a federal estate tax return is required to be filed for the deceased spouse, the Memorandum states that both a copy of the filed return and the "pro-forma" return must be filed with the ET-706.

For gifts made on or after July 24, 2011, gift splitting may be used by the same-sex couple. While New York State does not have a gift tax, gift splitting may affect whether the estate reaches the threshold necessary to file a New York State estate tax return. If the couple does elect to utilize gift splitting a "pro-forma" Form 709 (Federal Gift Tax return) must also be attached to the ET-706, when a spouse dies, to allow for the proper determination of the New York State Estate Tax filing threshold.

## Additional information given by NYS

In addition to giving guidance on the tax consequences to same-sex couples, the Tax Department issued guidance on the Federal 2010 Tax Relief Act and how it impacts New York State estates. While many of the provisions apply to death in the year 2010 and therefore do not apply to same-sex couples (the Act only applies to death on or after July 24, 2011) there is one major provision that could apply to the death involving same-sex couples: Portability.

The 2010 Tax Relief Act provides that the Federal unused exemption amount can be carried over to the surviving spouse. For example: If a husband dies with a taxable estate of $2 million, his unused $3 million exemption is "ported over" to his wife. She would then have an exemption equivalent of $8 million (her $5 million exemption plus her deceased husband's unused exemption of $3 million). In its Technical Memorandum, New York State has made it clear that portability does not apply for New York State estate tax purposes. Therefore, for New York State purposes each spouse is only entitled to an exemption equivalent of $1 million.

The adoption of the Marriage Equality Act has a major impact on the filing of New York State personal income tax returns and estate tax returns. Attorneys and accountants involved in advising same-sex couples on the impact of the new rules must be familiar with these guidelines.

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