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Marriage Under the Code

The IRS has issued final Treasury regulations that specify who is deemed to be a spouse, husband, or wife for US federal tax purposes, effective September 2, 2016. The new regulations were issued to make US federal tax law conform with recent US Supreme Court cases that uphold same-sex marriages and to bring additional clarity to the treatment of international marriages for US federal tax purposes.

The new regulations were promulgated under Code section 7701, which provides definitions applicable to all Code sections. The new regulations clarify that for US federal tax purposes, the terms “spouse,” “husband,” and “wife” mean an individual lawfully married to another individual. The term “husband and wife” means two individuals lawfully married to each other.

For marriages entered into in a US jurisdiction, the regulations look to the jurisdiction where the marriage was entered into, not the domicile of the marrying individuals when they entered into the marriage. Thus, the marriage is recognized for federal tax purposes if it was recognized by the US state, possession, or territory where it occurred.

Individuals who enter into a relationship denominated as marriage under the laws of a foreign non-US jurisdiction are recognized as married for US federal tax purposes if the relationship would be recognized as a marriage under the laws of at least one US state, possession, or territory, regardless of domicile.

The new regulations also clarify that certain relationships are not treated as marriages for US federal tax purposes. The terms “spouse,” “husband,” and “wife” do not include individuals who have entered into a registered domestic partnership, civil union, or other similar formal relationship that is not denominated as a marriage under the laws of the US state, possession, or territory where the relationship was entered into, regardless of domicile.

In the commentary released with the Treasury regulations (Internal Revenue Bulletin 2016-38), the IRS explained that the US states affirmatively have decided not to treat a registered domestic partnership, civil union, or other similar relationship as a marriage. Furthermore, an individual entering into such a relationship has deliberately chosen to enter into a registered domestic partnership or civil union as opposed to a marriage. The IRS also noted that no Code provision indicates that Congress intended to recognize a registered domestic partnership, civil union, or a similar relationship as a marriage. On the

basis of all of these factors, the IRS said that it will not issue regulations that turn these relationships into marriages for US federal tax purposes: the couples themselves have decided not to marry, and the US states and Congress have decided not to treat these relationships as marriages.

The new regulations apply for all purposes of the Code, including income, estate, and gift tax. On the income tax side, by clarifying who is a spouse for federal income tax purposes, the regulations also clarify who is a former spouse. That status is significant for determining when alimony and maintenance is includible in the income of a former spouse (Code section 71) and deductible from the income of the paying spouse (Code section 215), and also who is eligible to avoid gain or loss on a transfer of property between spouses and former spouses (Code section 1041). However, the non-recognition provisions of Code section 1041 do not apply if the spouse (or former spouse) of the transferor is a non-resident alien of the United States.

On the transfer tax side, the regulations make it much clearer who is a spouse for the purposes of the estate tax marital deduction (Code section 2056) and the gift tax marital deduction (Code section 2523). However, the estate and gift tax marital deduction remains unavailable for outright bequests to a surviving spouse who is not a US citizen, whether or not that person is deemed to be a spouse under US federal tax law.

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