



TAX BULLETIN 13-13

Virginia Department of Taxation

November 8, 2013

Virginia Income Tax Treatment of Same-Sex Marriage

On September 16, 2013, the Internal Revenue Service published Revenue Ruling 2013-17, 2013-38 I.R.B. 201, which provides that same-sex couples will be treated as married for federal tax purposes if they were legally married in a state that recognizes same-sex marriage, regardless of whether such couples live in a jurisdiction that recognizes same-sex marriage. This ruling was issued in response to the recent U.S. Supreme Court decision in *U.S. v. Windsor*, 133 S. Ct. 2675 (2013).

Because Virginia's income tax law generally conforms to federal income tax law, the marital status of a couple for Virginia income tax purposes is historically based on whether the couple is considered married for federal income tax purposes. However, Article I, § 15-A of the Constitution of Virginia and *Va. Code* § 20-45.2 specifically prohibit the recognition of any marriage in Virginia other than a marriage between one man and one woman. To determine the impact of Revenue Ruling 2013-17 on Virginia income tax returns, the Virginia Department of Taxation ("the Department") sought legal advice and was advised that Article I, § 15-A of the Constitution of Virginia and *Va. Code* § 20-45.2 require Virginia to conform from the federal income tax treatment of same-sex marriage.

Accordingly, same-sex married couples who file federal income tax returns jointly, or as married taxpayers filing separately, will be required to file their Virginia income tax returns as single individuals. This policy may potentially impact a number of items on Virginia income tax returns, including the following:

- Filing status,
- Above-the-line deductions,
- Standard and itemized deductions,
- Personal and dependency exemptions, and
- Virginia tax credits for low-income taxpayers.

This Tax Bulletin provides an overview of some of the required adjustments same-sex married couples must make when filing their Virginia income tax returns as single taxpayers. In addition, this Tax Bulletin briefly covers adjustments that must be made by businesses that claim deductions for certain expenses incurred for same-sex partners of employees.

Impact on Virginia Individual Income Taxpayers

As a result of Revenue Ruling 2013-17, same-sex married couples will now file their federal tax returns either jointly or as married individuals filing separately. Since same-sex couples that are legally married in other states are considered unmarried for Virginia income tax purposes, such individuals must file their Virginia income tax returns as single taxpayers, regardless of whether they filed joint or separate federal returns. Because the computation of an individual's Virginia taxable income begins with his or her federal adjusted gross income ("FAGI") pursuant to *Va. Code* § 58.1-322, affected individuals must create pro forma federal returns using a filing status of either "single" or "head of household" and must account for expenses and other factors on a separate basis. The recalculated FAGI and other tax attributes from the pro forma federal return must then be used when filing the single Virginia income tax return to determine Virginia taxable income.

The IRS issued a news release related to Revenue Ruling 2013-17 providing that same-sex married couples may, but are not required to, file original or amended returns using a married filing status for federal tax purposes for one or more prior tax years still open under the statute of limitations. Since Virginia conforms to the newly established federal policy, same-sex married couples may not file original or amended returns using a married filing status for Virginia tax purposes for any taxable year.

Recalculation of FAGI

Same-sex couples who file federal returns jointly or as married taxpayers filing separately must recalculate their FAGI for Virginia purposes as if their federal income tax returns were prepared using a filing status of either "single" or "head of household." Using a different filing status may potentially impact the ability of affected taxpayers to claim certain above-the-line deductions for Virginia income tax purposes. This is because many deductions can be claimed only by a taxpayer if they are related to the taxpayer, his or her spouse, and his or her dependents. Those above-the-line deductions most likely to be affected by a change in taxpayer filing status include the following:

- The health savings account deduction,
- The self-employed health insurance deduction,
- The individual retirement account deduction,
- The deduction for interest on educational loans, and
- The deduction for tuition and fees.

In addition, alimony and separate maintenance payments made pursuant to a valid divorce decree or separation agreement between former same-sex spouses may potentially be deducted for federal purposes but cannot be deducted for Virginia purposes. Since Virginia does not recognize same-sex marriage, the deduction of alimony and separate maintenance payments between former same-sex spouses is not permitted for Virginia income tax purposes. Accordingly, individuals making such

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alimony or separate maintenance payments must include these amounts as income on their pro forma federal returns.

Standard Deductions

Any taxpayer who does not itemize deductions for federal purposes may claim a standard deduction in the computation of Virginia taxable income. Pursuant to *Va. Code* § 58.1-322(D)(1)(b), the amount of the standard deduction is \$3,000 for single taxpayers and \$6,000 for married taxpayers filing jointly. Same-sex married couples who do not itemize deductions on their joint federal returns must claim the standard deduction for single taxpayers on their individual Virginia returns.

Itemized Deductions

Pursuant to *Va. Code* § 58.1-322(D)(1) and 23 VAC 10-110-143, any taxpayer who itemizes deductions for federal income tax purposes must also itemize deductions for Virginia income tax purposes. The amount of Virginia itemized deductions is generally equal to the amount of itemized deductions allowed for federal purposes, less the federal deduction for state income taxes. Since Virginia deconforms from the federal recognition of same-sex marriage, same-sex married couples who itemize deductions on their joint federal returns must recalculate their itemized deductions as single taxpayers on their pro forma federal returns. The recalculated itemized deductions from the pro forma federal return must then be used when filing the single Virginia income tax return to determine the amount of Virginia itemized deductions. Any taxpayer who itemizes deductions on his or her federal return may not claim a standard deduction on his or her pro forma federal return or Virginia income tax return.

This tax treatment is similar to the Department's policy regarding traditional married couples in cases where one spouse is a Virginia resident and the other spouse is a nonresident. For such couples, an itemized deduction may only be claimed by the spouse who can account for the corresponding expense. Same-sex couples may not allocate itemized deductions between each partner in proportion to his or her income. Same-sex couples must separately account for their expenses and only the individual who can account for a particular expense may claim the corresponding deduction on his or her pro forma federal return.

Personal and Dependency Exemptions

Pursuant to *Va. Code* § 58.1-322(D)(2), taxpayers may claim a deduction of \$930 for each personal exemption they are permitted to claim for federal income tax purposes. Taxpayers who are blind or who are age 65 or older may claim an additional \$800 exemption. Same-sex married couples, required to file their Virginia returns as single taxpayers, may not claim their partner's personal exemptions.

Same-sex married couples with one or more dependents must determine which partner will claim their dependents' personal exemptions for Virginia income tax purposes. Specifically, if a dependent is a "qualifying child" of a same-sex married couple under

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I.R.C. § 152(c), either parent, but not both, may claim a dependency deduction for the qualifying child on his or her Virginia income tax return. If both same-sex parents claim a dependency deduction for the child on their income tax returns, the child will be treated as the qualifying child of the parent with whom the child resides for the longer period of time during the taxable year. If, however, the child resides with each parent for the same amount of time during the taxable year, the child will be treated as the qualifying child of the parent with the higher adjusted gross income. This policy is consistent with the federal policy for dependents of same-sex married couples who file their federal returns using a married filing separately status.

Only the same-sex partner who claims his or her dependent's personal exemption may claim an adjustment to his or her Virginia adjusted gross income for any employment-related child and dependent care expenses incurred on the dependent's behalf. Pursuant to *Va. Code* § 58.1-322(D)(3) and 23 VAC 10-110-143, the amount of employment-related expenses allowed for computing the federal child and dependent care credit may be deducted from Virginia adjusted gross income when computing Virginia taxable income. The deduction is limited to the actual expenses used in computing the federal credit.

Virginia Tax Credits for Low-Income Taxpayers

Pursuant to *Va. Code* § 58.1-339.8, taxpayers with a family Virginia adjusted gross income at or below the corresponding amount listed in the federal poverty guidelines may claim a Virginia income tax credit equal to \$300 each for themselves and any dependents claimed on their Virginia income tax return ("the Tax Credit for Low-Income Individuals"). For purposes of this credit, "family Virginia adjusted gross income" is defined as "the combined Virginia adjusted gross income of an individual, the individual's spouse, and any person claimed as a dependent on the individual's or his spouse's income tax return for the taxable year."

When a same-sex married couple files their separate Virginia income tax returns, each partner must determine whether his or her family Virginia adjusted gross income, excluding the income of the other partner and any dependents claimed by the other partner for Virginia income tax purposes, is at or below the corresponding amount in the federal poverty guidelines. Accordingly, the adjustment of filing statuses and dependency exemptions for Virginia income tax purposes could potentially impact eligibility for the Tax Credit for Low-Income Individuals.

In lieu of the Tax Credit for Low-Income Individuals, taxpayers eligible to claim the federal Earned Income Tax Credit ("EITC") may instead claim a Virginia income tax credit equal to 20 percent of the federal credit ("the Virginia EITC"). To determine any amount of the Virginia EITC, same-sex married couples must determine the amount of federal EITC that they would have been eligible to receive if they had filed their federal returns using either a "single" or "head of household" status. Such individuals are permitted to claim the Virginia EITC in an amount equal to 20 percent of the federal EITC as redetermined for Virginia income tax purposes, based on the separate income

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and dependency deductions claimed by each partner on his or her pro forma federal return.

Withholding Virginia Income Tax

Same-sex married couples who are required to file their Virginia income tax returns as single individuals must claim the proper amount of withholding allowances on Form VA-4, Personal Exemption Worksheet. Consider, for example, a same-sex married couple with one dependent child. Assuming that both same-sex partners are wage earners and that they file a joint federal return, each partner would generally claim personal allowances for himself, his spouse, and his dependent child on federal Form W-4. However, when completing Form VA-4, neither partner may claim an exemption for a spouse, and only one partner, but not both, may claim an exemption for the dependent child.

Impact on Virginia Business Deductions

In addition to the impact on individual income taxpayers, Virginia's deconformity from the federal recognition of same-sex marriage may also impact the business deductions of certain corporations, pass-through entities, and sole proprietorships. Under the newly established federal policy, employers may claim a federal deduction for payments of fringe benefits to employees' same-sex spouses and dependents. Since Virginia does not recognize same-sex marriage, these businesses must adjust the deductions they claim for Virginia income tax purposes accordingly.

Further Instructions

The required adjustments that same-sex married couples and certain businesses must make when filing their Virginia income tax returns include, but are not limited to, the items identified in this Tax Bulletin. Additional adjustments may be required, depending on the facts and circumstances surrounding each affected taxpayer's unique situation.

Prior to the 2014 filing season, the Department will release additional guidelines for affected individuals and businesses that file Virginia income tax returns. Such guidelines will be posted on the Department's website. For more information, please contact the Office of Customer Services at (804) 367-8031 or the "Live Chat" service on the Department's website. This Tax Bulletin, along with other reference documents, is available online in the Laws, Rules and Decisions section of the Department of Taxation's website, located at www.tax.virginia.gov.