New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-06(2)I
Income Tax
April 4, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I050208A

On February 8, 2005, a Petition for Advisory Opinion was received from John Galanti, c/o Alphonso David, Esq., Lambda Legal Defense and Education Fund, 120 Wall Street, Suite 1500, New York, New York 10005.

The issue raised by Petitioner, John Galanti, is whether Petitioner's marriage to his same-sex partner will be recognized for New York State personal income tax purposes.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner was legally married to his same-sex partner in Canada in 2004. Petitioner and his partner are both residents of New York State.

Applicable law and regulations

Section 607(a) of the Tax Law provides:

> General. Any term used in this article shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required but such meaning shall be subject to the exceptions or modifications prescribed in this article or by statute. Any reference in this article to the laws of the United States shall mean the provisions of the internal revenue code of nineteen hundred eighty-six (unless a reference to the internal revenue code of nineteen hundred fifty-four is clearly intended), and amendments thereto, and other provisions of the laws of the United States relating to federal income taxes, as the same may be or become effective at any time or from time to time for the taxable year.

Section 607(b) of the Tax Law provides:

> Marital or other status. An individual's marital or other status under section six hundred one, subsection (b) of section six hundred six and section six hundred fourteen shall be the same as his marital or other status for purposes of establishing the applicable federal income tax rates.

Section 651(b) of the Tax Law provides, in part:

> (1) If the federal income tax liability of husband or wife is determined on a separate federal return, their New York income tax liabilities and returns shall be separate.

(2) If the federal income tax liabilities of husband and wife (other than a husband and wife described in paragraph four of this subsection) are determined on a joint federal return, they shall file a joint New York income tax return, and their tax liabilities shall be joint and several except as provided in paragraph six of this subsection, section six hundred fifty-four and subsection (e) of section six hundred eighty-five.

(3) If neither husband or wife files a federal return:

(A) they shall file a joint New York income tax return, and their tax liabilities shall be joint and several except as provided in paragraph six of this subsection, section six hundred fifty-four and subsection (e) of section six hundred eighty-five, or

(B) they may, if both so elect, file separate New York income tax returns, in which event their tax liabilities shall be separate.

(4) If either husband or wife is a resident and the other is a nonresident or part-year resident, they shall file separate New York income tax returns, in which event their tax liabilities shall be separate, unless such husband and wife determine their federal taxable income jointly and both elect to determine their joint New York taxable income as if both were residents, in which event their tax liabilities shall be joint and several except as provided in paragraph six of this subsection, section six hundred fifty-four and subsection (e) of section six hundred eighty-five.

Section 151.10(b)(1) of the New York State Personal Income Tax Regulations (Regulations) provides, in part:

General. The Federal rules for determining whether a husband and wife qualify for filing a joint Federal income tax return also apply for New York State personal income tax purposes. . . .

Section 6013(a) of the Internal Revenue Code provides, in part:

Joint Returns. A husband and wife may make a single return jointly of income taxes under subtitle A, even though one of the spouses has neither gross income nor deductions. . . .

Section 7 of Title 1 of the United States Code, as added by Public Law 104-199 (the Federal Defense of Marriage Act), enacted September 21, 1996, provides:

Definition of “marriage” and “spouse”

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

Opinion

Section 607(a) of the Tax Law provides that any term found in the personal income tax provisions of the Tax Law shall have the same meaning as the term has for federal income tax purposes, unless a different meaning is clearly required, *but* such meaning shall be subject to exceptions or modifications by the personal income tax provisions of the Tax Law or by other statute. If a different meaning is clearly required, departure from the federal definition is acceptable even though there is no specific exemption or modification in the Tax Law. However, section 607(b) of the Tax Law supplements section 607(a) of the Tax Law by specifically providing that an individual's marital status is the same as such individual's marital status established for federal income tax rate setting purposes. Section 651(b) of the Tax Law provides that an individual's New York filing status is determined by his or her filing status for federal income tax purposes. Therefore, New York State follows the federal determination of filing status.

Under the Federal Defense of Marriage Act (P.L. 104-199), the Internal Revenue Service does not recognize same-sex marriages for federal income tax purposes, including for purposes of filing a joint return. Therefore, Canadian same-sex marriages are not treated as marriages for federal income tax purposes.

Accordingly, since Petitioner's marriage to his same-sex partner is not a marriage for federal income tax purposes, it is not a marriage for New York State personal income tax purposes.

DATED: April 4, 2006

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.