



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D. C. 20224

OFFICE OF THE CHIEF COUNSEL

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The Honorable Barbara Boxer
United States Senator
1700 Montgomery Street, Suite 240
San Francisco, CA 94111

Attention:

Dear Senator Boxer:

I am responding to your inquiry of June 03, 2011, on behalf of your constituents, _____ and _____. They wrote about difficulties that they experienced filing their federal income tax returns for 2010 as a same-sex married couple in California.

The IRS has taken the position that, because federal tax law respects California community property law, registered domestic partners and same-sex married couples in California must each report one-half of their community income for federal income tax purposes (Chief Counsel Advice 201021050, issued May 5, 2010). The IRS is aware that the extension of community property laws to same-sex couples in California has caused some taxpayers to incur increased tax return preparation fees and has raised some additional legal and compliance issues. The IRS is currently reviewing these issues and considering how best to ensure that same-sex couples receive the information they need to timely and accurately complete their federal income tax returns.

Your constituents asked us to clarify whether social security benefits are community income and how registered domestic partners and same-sex married couples should treat self-employment income. Generally, state law determines whether an item of income constitutes community income. As noted above, federal tax law generally respects state property law characterizations and definitions. *U.S. v. Mitchell*, 403 U.S. 190 (1971). Accordingly, if social security benefits are community income under California law, then they are also community income for federal income tax purposes. If social security benefits are not community income under California law, then they are not community income for federal income tax purposes.

If trade or business income is community income, registered domestic partners or a same-sex married couple split the income for federal tax purposes, including self-employment taxes. Although the self-employment tax rules contain a provision that overrides community income treatment in the case of spouses (section 1402(a)(5) of the Internal Revenue Code), this provision does not apply to registered domestic partners or, because of the Defense of Marriage Act, to same-sex married couples.

If you have any questions, please contact me or _____ at _____ .

Sincerely,

Michael J. Montemurro
Chief, Branch 4
Office of Associate Chief Counsel
(Income Tax & Accounting)