



## **Robert W. Wood** THE TAX LAWYER

---

Jan. 24 2011 — 9:03 am

### One More Tax Filing Status: Same Sex Partners?

I recently wrote that most of us don't think much about our [tax filing status](#), the simple boxes at the top of our IRS Form [1040](#) about how we're filing.

If we're single, we file single. If married, we file married filing joint. Like an automaton, we check the box. For completeness, I should note there's also a category for head of household and qualifying widow(er) with dependent child.

Few people consider their choices. If you are married you can file married filing joint (one return) or married filing separate (two returns). The latter is often ignored and can be worth a second look. See [Consider Tax Filing Status Carefully](#).

Turns out I left out a significant group of tax filers, one that has recently had lots of confusing messages about just how to reflect their filing status: same sex couples. Of course, there is no box to check. Some gay couples could think that if they married in a state authorizing it, they could—like any other married couple—check the married filing joint box or married filing separately.

But would the IRS allow that, and what of the vastly larger number of [registered domestic partners](#)? In May 2010, the IRS issued three important announcements about same-sex couples who are registered

domestic partners under [California law](#). But if you read them you may be more than confused. They are [Private Letter Ruling 201021048](#), [Chief Counsel Advice 201021049](#), and [Chief Counsel Advice 201021050](#).

Does this guidance say you can file jointly just like a married heterosexual couple? Not hardly. In fact, a vastly oversimplified version of this guidance is that registered domestic partners in California (at least) must split their joint income and their tax withholding 50/50. However, each still has to file individually. See [Gay Couples Get Equal Tax Treatment](#).

Interestingly, this 50/50 split—a creature of California’s community property law—is apparently not optional. Although this suggests that one partner is making a transfer to the other, neither partner will be considered to be making taxable gifts—the treatment that had earlier applied to transfers outside of marriage.

That seemed like great news, but the “how to fill out my 1040!” details were not spelled out. As it turns out, filling out your forms isn’t so easy. Whether on a new tax return for 2010 or amended ones for certain prior years (which the IRS decision allows), the mechanics are tough. The suggestions are that you need to e-file, and that you may need professional help. See [For Same Sex Couples, a Tax Victory That Doesn’t Feel Like One](#).

California state law had accorded community property treatment to registered domestic partners by 2007, so the IRS says you can amend your 2007, 2008 and 2009 tax returns to report 50/50 if you like. Fortunately, you are not required to. But you **are** required to report in this way for 2010. That will cause some headaches.

All this is daunting and makes clear that tax reporting for same sex couples still needs work, especially when you consider the mix of federal and state law. Nevertheless, the largest tax problems posed by lack of parity between heterosexual and same sex couples can be the tax treatment of splitting up. Divorce tax rules are fairly straightforward and ameliorative. See [How To Make Divorce Less Taxing](#). If you’re not married and divvy up assets, the tax impact can be severe. See [Gay Or Straight, Marriage Matters—For Taxes](#).

*Robert W. Wood practices law with [Wood & Porter](#), in San Francisco. The author of more than 30 books, including *Taxation of Damage Awards & Settlement Payments* (4th Ed. 2009, [Tax Institute](#)), he can be reached at [wood@woodporter.com](mailto:wood@woodporter.com). This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.*