

Rabbi Dr. Broyde is a Professor of Law at Emory University School of Law and a *dayyan* in the Beth Din of America

# **MAY AN ORTHODOX YESHIVAH DAY SCHOOL OR HIGH SCHOOL PROVIDE PARSONAGE TO WOMEN TEACHING JUDAIC STUDIES**

## **Introduction**

Jewish law imposes an obligation upon its adherents to obey the law of the land generally and to pay lawfully due taxes specifically. Cheating on one's taxes, either by an individual or by an institution, would be a violation of Jewish law.<sup>1</sup> On the other hand, there is no obligation to pay a greater tax than the amount properly due.<sup>2</sup> Since American tax law is a complex area of law – frequently devoid of any obvious ethical underpinnings – the determination of whether conduct is legal or not can be made only by a technical analysis of the various provisions of the *Internal Revenue Code* and its relevant supporting documentation.

This article addresses a highly specific question, unique to Orthodox Jews and their religious institutions: May an Orthodox Jewish yeshivah provide parsonage for women teaching Judaic studies? Due to the fact that Orthodox Jewish institutions do not ordain women as rabbis, women teachers of Judaica have been regarded as ineligible. Thus, the historical answer to this question has been “no,” and this has been the practice of Orthodox institutions throughout the country.

In light of changes in the parsonage statute codified by Congress in the *Clergy Housing Allowance Clarification Act of 2002*,<sup>3</sup> recent Internal Revenue Service issuances and the recent practice of awarding women

formal certificates authorizing them as role models and Judaic teachers in Jewish schools, there is now ample foundation for women who hold a certificate as a teacher or a certificate of advanced knowledge in Jewish law and who teach Jewish subjects in a yeshivah, to be given parsonage by their home institution.

### **Parsonage: The Statute**

The *Revenue Act of 1921* was the first to permit the exclusion of the rental value of a minister's home from his gross income, and this exclusion has been preserved as Section 107 of the 1954 revised *Internal Revenue Code*, where it still resides (albeit in amended form).<sup>4</sup> The current version of the statute states as follows:

107. Rental value of parsonages

In the case of a minister of the gospel, gross income does not include--

- (1) the rental value of a home furnished to him as part of his compensation; or
- (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.<sup>5</sup>

The critical words in the statute relevant to this article: "minister of the Gospel," are nowhere defined in the law; indeed, on face value, they would seem inapplicable to Jews in general and not to women in particular. Historically, however, there has been a determination of who is eligible for the parsonage exclusion.

### **Who Is a Minister of the Gospel?**

The courts of the United States have consistently held that although one could take the statute literally to mean that faiths that do not preach the Gospels are not entitled to the parsonage exclusion, such was not the intent of Congress and ministers of all faith groups are entitled to exclude the parsonage allowance from their gross income.<sup>6</sup>

It remains a difficult task, nevertheless, to determine who is a Jewish "minister of the gospel" and thus eligible for parsonage exclusion under Section 107.

The Internal Revenue Service *Revenue Ruling 78-301*,<sup>7</sup> which concludes that cantors who are provided parsonage may exclude such amounts from gross income, cites the *Treasury Regulations*.<sup>8</sup> They provide the following examples of specific services that will be considered duties of a minister for the purposes of determining whether one qualifies for the parsonage exclusion under Section 107:

- (1) the performance of sacerdotal functions;
- (2) the conduct of religious worship;
- (3) the administration and maintenance of religious organizations and their integral agencies; and
- (4) *the performance of teaching and administrative duties at theological seminaries.*<sup>9</sup>

The Regulations accompanying *I.R.C. Section 107* instruct that *Treasury Regulation Section 1.1402(c)-5*<sup>10</sup> will apply in determining when services by a minister are in the exercise of his ministry.

Thus, the IRS has acknowledged that those standards contained in the *Treasury Regulations* for ordination vary from denomination to denomination, and that the functions of a minister vary from denomination to denomination. *Revenue Ruling 78-301* states that:

There [is not] a standard in the regulations that the ordination, commissioning, or licensing bestow the power to perform certain religious functions that could not be performed by another member of the congregation. When the individual's regular, full-time duties to the congregation are spiritual or religious in nature, such as leading the worship service, those duties are in the exercise of the ministry.

Based on this approach, the IRS ruled that a cantor, even though not ordained, qualified for the parsonage exclusion as a “minister of the gospel” with a mere certification (albeit not required by Jewish law) that they were trained as a cantor. There is no doubt that a cantor is untrained to conduct many of the services that a rabbi is trained to perform and, indeed, lacks the central qualification for being a rabbi, i.e., the ability to answer questions of Jewish law. Nonetheless, such a person is involved in the “performance of the sacerdotal rites of Judaism” and is thus a “minister of the gospel” for Section 107 purposes.

## How is one Ordained to be a Minister of the Gospels?

Centrally, what we have here is a *law and religion* problem in tax law. The definition of “ordination,” “commission,” or “license” used in *Revenue Ruling 78-301* (in the sense of sacerdotal authorization that “bestows the power to perform certain religious functions that could not be performed by another member of the congregation”) simply does not readily apply to the Jewish tradition. Jewish law differs fundamentally from other substantive religious legal systems — such as Canon Law<sup>11</sup> — that rigidly distinguish between lay and clerical leadership and which have thus refused to grant parsonage to lay women who minister to the community. This is fully consistent with the requirement of the United States tax court, which has consistently ruled that it is not the formal ordination that is required for one to be eligible for the parsonage exclusion, but the assumption of the duties and functions of a minister.<sup>12</sup>

The Jewish legal tradition lacks almost any ecclesiastical function that can be performed by ordained rabbis only and recognizes that lay leadership can rise to the level of clergy in functionality, form, title and duties. Indeed, cantors historically lacked any certification or ordination at all and many cantors — to this day — are uncertified. Even rabbinic ordination is a matter of custom or tradition rather than a formal mandate of Jewish law. Many a great rabbi was never formally ordained; one can even head a rabbinical seminary in the Jewish tradition without formal ordination. Thus, a yeshivah need not have doubts about the source of sacerdotal authority in the Jewish tradition, as such authority is diffuse, and if the yeshivah in question authorizes men and women to perform recognized clerical functions then women who teach Judaic studies qualify for parsonage even without ordination, given the functional definition accepted by *IRS Revenue Ruling 78-301*.

Consider for example, a simple responsum found in Rabbi Moses Feinstein, *Iggrot Moshe (Yoreh Deah 3:70)*, which discusses whether a prominent scholar who was never formally ordained may be removed from his rabbinical pulpit merely because he lacked ordination. Rabbi Feinstein, the premier Jewish law decisor in America of the last century, answered that such a person may not be removed from the rabbinate even if he lacks ordination because he had been providing ecclesiastical guidance to those who have accepted his authority. As a scholar of Jewish law, that person is entitled to be the spiritual leader of the

congregation in question even without rabbinical ordination.<sup>13</sup> Such a religious leader would also undoubtedly qualify for the parsonage exclusion under Section 107.<sup>14</sup>

In 2003, the IRS issued a *Technical Advice Memorandum*,<sup>15</sup> which, while not binding upon the IRS, provided guidance concerning its enforcement policy regarding the classification of “ministers of the gospel.” The IRS applied a five-factor balancing test<sup>16</sup> to determine when a person who belongs to a faith that does not require formal ordination from the religious hierarchy in order to preside over religious services, is entitled to exercise the parsonage exclusion. They are:

1. Does this person administer sacerdotal functions customarily administered only by clergy?
2. Does this person conduct worship services?
3. Does this person perform services in the control, conduct, and maintenance of a religious organization?
4. Is this person considered a spiritual leader by his or her religious body?, and
5. Does this person have a formal license, commission or ordination?

Based on this test, the IRS denied the right to exclude parsonage allowances from gross income of secular faculty in a school since its teachers and administrative staffs were hired as teachers and administrators, not as ministers, and none of their prescribed duties was equivalent to the services performed by a minister.<sup>17</sup>

On the other hand, the IRS has recognized (as Rabbi Feinstein had, as well) that when a person holds a position in a religious institution, yet lacks formal ordination to qualify as a rabbi, he may still be eligible for the parsonage exclusion if he has been invested with ecclesiastical authority (as a minister) by the hiring organization.<sup>18</sup> A school can decide for itself who functions in an ecclesiastical role, with or without formal ordination.

### **Women Judaic Studies Teachers in a Yeshivah**

A yeshivah elementary school or high school is not a congregation, but it is a parochial school or a seminary devoted to the teaching of Judaic studies in conformity with the doctrines of Orthodox Judaism. Thus, a person hired by the yeshivah who performs all of the functions performed by an ordained rabbi at the yeshivah, should qualify for

parsonage as a minister under Section 107. This would allow women who teach Judaic studies, supervise prayers, and provide religious counseling of the kind provided by rabbis in the school, to qualify for the parsonage exclusion based on the essentially sacerdotal nature of their function within the yeshivah, although this *may* not apply to a teacher of Hebrew language or even the academic study of Talmud. However, in any situation in which the yeshivah expects a woman teacher to conduct core religious services, mandates that this teacher adhere to a specific level of religious conduct in her personal life, and expects this conduct to continue outside school grounds, that teacher is engaging in conduct that is the functional equivalent of ordination. This functional ordination is what allows the granting of parsonage and the corresponding exclusion from gross income, as it is the yeshivah that employs her that has functionally ordained her. It is the school that provides the commission and the equivalent of religious ordination minimally required by *Section 1402(c)* to be eligible for the parsonage exclusion that is permitted under *I.R.C. Section 107*.

While it is the functional commission by the yeshivah and the performance of these sacerdotal functions that makes one eligible for the exclusion of the parsonage allowance in the Jewish faith, as discussed in *Revenue Ruling 78-301*, a formal certification that makes it clear which women are qualified for such positions would be very helpful. An example of such an external commission might be a certificate of achievement provided by the Yeshivah University Graduate Program for Women in Advanced Talmudic Study or the letter of certification provided by some teachers' seminaries.<sup>19</sup>

## Conclusion

The obligation to obey the law of the land is a significant one for all Orthodox Jews, and paying one's taxes with integrity is a crucial manifestation of that obligation. The tax laws of the United States, as understood by the courts and clarified by the various documentary issuances of the Internal Revenue Service of the United States, recognize that parsonage allowances may be awarded and excluded from the gross income of people who lack formal ordination, so long as they are functioning as clergy in the institution that employs them. In many yeshivahs, some women serve in roles identical to those served by

rabbis, e.g., supervising prayer, providing religious guidance, teaching sacred texts with religious fervor, conducting themselves as religious role models, and otherwise serving sacerdotal functions. These women are entitled to the parsonage allowance exclusion according to the laws of the United States.

NOTES:

- 1 For more on this see my *The Pursuit of Justice: A Jewish Perspective on Practicing Law*, Second Edition (Yashar Press, forthcoming, 2005), chapters 5-7, and “Informing on Others for Violating American Law: A Jewish Law View,” *The Journal of Halacha and Contemporary Society* 41(2002), 5-49.
- 2 Rabbi Ezra Bick: “Payment of Income Taxes: Halachic Guidelines,” in Menachem Kellner, ed. *Contemporary Jewish Ethics* (NY 1978), 344-346 (noting the lack of obligation to overpay). Cf. also, *Helvering v. Gregory*, 69 F2d 809, 810 (2d Cir. 1934) (Justice Learned Hand, noting that “[a]ny one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one’s taxes”).
- 3 For a description of what propelled this statutory modification, cf. Ellen Onsi Bonito and James L. Wittenbach: “Who Qualifies, and When, for the Parsonage Allowance for ‘Ministers?’” 14 *Tax’n of Exempts* 227 (2003), which notes:  
Last Spring, President Bush signed the *Clergy Housing Allowance Clarification Act of 2002*, P.L. 107-181 (5/21/02), generally effective for tax years beginning after 2001. The new law clarifies the exclusion for clergy housing allowances by codifying Rev. Rul. 71-280, 1971-2 C.B. 92, which limits the exclusion to the housing’s fair market value. The legislation, which rushed through both houses of Congress with broad bipartisan support, was a response to *Warren [v. Comm.]*, 114 TC 343 (2000), then before the Ninth Circuit, which had indicated that it might consider the constitutionality of the housing allowance exclusion before ultimately dismissing the case.
- 4 *Revenue Act of 1921*, ch. 136, § 213(b)(11), 42 Stat. 239. Although the *Revenue Act* uses the term “him” to refer to ministers of the gospel, presumably because at that time all ministers of the gospel were male, this assumption is not appropriate today.
- 5 I.R.C. § 107.
- 6 Cf., e.g. *Salkov v. C.I.R.*, 46 T.C. 190 (1966).
- 7 *Rev. Rul. 78-301*, 1978-2 C.B. 103.
- 8 *Treas. Reg. § 107-1(a)*.
- 9 Cf., e.g., *Silverman v. Commissioner*, 57 T.C. 727 (1972) (a full-time cantor of

Jewish faith was “minister of the gospel” within the meaning of this Section 107).

- 10 *Treas. Reg.* §1.1402(c)-5(b)(2)(i)-(v) provides the rules applicable to determining whether services are “performed by a minister in the exercise of his ministry.” Such services generally will include “the ministration of sacerdotal functions and the conduct of religious worship, and the control, conduct of religious worship, and the control, conduct, and maintenance of religious organizations (including the religious boards, societies, and other integral agencies of such organizations) under the authority of a religious body constituting a church or church denomination.” Among the factors considered by these rules are (1) the tenets and practices of a particular religious body, (2) that a religious organization is “dedicated to carrying out the tenets and principles of the faith in accordance with either the requirements or sanctions governing the creation of institutions of the faith,” (3) that a minister, if conducting worship or performing sacerdotal functions, is performing service in the exercise of his ministry whether or not performed for a religious organization, (4) that all service performed by a minister for an organization which is operated as an *integral agency* of a religious organization is in the exercise of his ministry, (5) that service performed by a minister pursuant to an assignment or designation by a religious organization constituting his church, even if performed for an organization that is neither a religious organization nor operated as an integral organization, will be in the exercise of his ministry, even though such service may not involve the conduct of religious worship or the ministration of sacerdotal functions.
- 11 The Jewish tradition contrasts sharply with the Catholic tradition on the role filled by ordination. In the Catholic tradition, valid ordination is a necessary component of priestly ministry. Only clerics may minister the sacraments of confession, the Eucharist, confirmation or anointing. Cf. Coriden, Green & Heintschel: *The Code of Canon Law: A Text and Commentary*, canon 965, canon 900, canon 882, canon 1003. The absence of a validly ordained cleric would result in the sacraments being invalidly administered. Only clerics, furthermore, may hold certain offices of governance within the Church (canon 274:1). The absence of a validly ordained bishop breaks this chain and results in Holy Orders being invalidly administered. Only a subsequent juridical act, known as a *sanatio in radice*, a “curing from the roots,” suffices to remedy this defect (see canons 1161-1165).
- 12 Cf. *Wingo v. Commissioner*, 89 TC 922 (1987). This case is quite important for the matter at hand, since, as noted by Bonito and Wittenbach: *Op. cit.*, the tax court ruled that:

the phrase ‘ordained, commissioned, or licensed’ is a disjunctive phrase. One who is not ordained can still be a minister if he or she is duly commissioned or licensed to be a minister. The regulations and case law do not distinguish between one ordination and another or between ordination and licensing. *Wingo*



was deemed a minister for purposes of Section 1402(c) because he was licensed as a pastor and ordained as a deacon and, *more importantly, because he assumed and performed all of the duties and functions of a minister during the years in question.*

- 13 This derives explicitly from the notations of Rabbi Moses Isserless (d. 1575) on the classical code of Jewish law, *Shulhan Arukh* (*Yoreh Deah* 245:22), which notes that one who lacks any formal external appointment to the rabbinate but functions in a position of authority, may not be readily removed. Similar sentiments can be found in the responsa of Rabbi Isaac ben Sheshet Perfect (*Rivash*, d. 1408) 271.
- 14 On the other hand, courts have repeatedly made it clear that if one's basic work was without any religious overtone, one is not entitled to the parsonage exclusion even if one is ordained. Thus, an administrator of a nursing home was not entitled to the parsonage allowance exclusion, even though the administrator was an ordained minister and operated nursing homes under a "fellowship" of Assemblies of God Church, since the administrator failed to show any objective manifestation of control over the nursing homes by the church and did not function as a minister. Cf. *Toavs v. Commissioner of Internal Revenue*, 67 T.C. 897 (1977). So too, an ordained Baptist minister employed by the Christian Anti-Communist Crusade (a nonreligious organization tax-exempt under section 501(c)(3) of this IRS code) was not entitled to a parsonage allowance exclusion for the same reason. Cf. *Colbert v. Commissioner*, 61 T.C. 449 (1974).
- 15 *Tech Adv. Mem.* 03-18-002 (May 2, 2003).
- 16 The test applied by the IRS in this Technical Advice Memorandum had previously been applied by the Tax Court in *Knight v. Commissioner*, 92 T.C. 199 (1989) [the taxpayer was not commissioned because no congregation or other body of believers was committed to his charge, and the duty of spreading the gospel, *either by sermon or teaching*, was not formally entrusted to his care], and *Wingo v. Commissioner*, 89 T.C. 911 (1987) [the court made a facts and circumstances determination that the duties performed by the taxpayer fell far short of a person performing duties of a minister of the gospel despite the church's formal commission of said taxpayer as "Commissioned Minister of the Gospel in Religious Education that he may receive benefits relative to the Social Security Act and Internal Revenue Services"].
- 17 A close case would be *Tanenbaum v. Commissioner*, 58 T.C. 1 (1972), where the American Jewish Committee employed an ordained rabbi as director of inter-religious affairs. The IRS ruled, however, that since he was not employed to perform any sacerdotal duties or conduct religious worship but to foster understanding of Judaism, and since the American Jewish Committee was constituted as tax-exempt educational (but not religious) organization, parsonage may not be granted.
- 18 *Rev. Rul.* 60-90, 1960-1 C.B. 387.

19 Consider the following certificate, which is very close to an ordination certificate:

Bais Yaakov Teachers' Seminary (Institute)

Teacher's Certificate

We hereby certify that \_\_\_\_\_successfully completed the course of instruction at Bais Yaakov Teachers' Seminary (Institute), and from this point forward (is) fit and certified to instruct and teach Torah to Jewish children and [unite] their hearts to love and fear God.

May she set the faithful, tender youth on a straight course and impress the path of life into their hearts. May God grant success in her hands to widen the tent of Torah and rule with perfection of heart over Jacob.

We attest to this by affixing our signatures on day \_\_\_\_\_of the month \_\_\_\_\_of the year \_\_\_\_\_[of the Jewish reckoning]

Signed, \_\_\_\_\_

The certificate issued by Yeshiva University is less theological, but still relevant. It states:

Yeshiva University

Graduate Program for Women in Advanced Talmudic Studies

Certificate of Achievement

[Name of student] has fulfilled a rigorous course of study in Talmudic and rabbinic texts and has satisfactorily completed all the requirements for the Graduate Program for Women in Advanced Talmudic Studies, supported by The Avi Chai Foundation, and has therefore earned the approbation of Yeshiva University.