

## Orthodox Yeshivas, Female Instructors, and the Parsonage Allowance, Taxation of Exempts (WG&L), Jul/Aug 2006

Taxation of Exempts [formerly Journal of Taxation of Exempt Organizations] (WG&L)

RELIGIOUS ORGANIZATIONS

# Orthodox Yeshivas, Female Instructors, and the Parsonage Allowance

*Author: MICHAEL J. BROYDE*

*MICHAEL J. BROYDE is a professor at the Emory University School of Law in Atlanta, GA.*

The intersection of law and religion has often been tangled in the United States, and seems more fraught now than only a few years ago. Yet the respect of American law for religion remains a bedrock value extending from the First Amendment down through the tax laws. One such tax provision, the parsonage allowance now embodied in [Section 107](#), excludes the value of a home or housing allowance from the income of a "minister of the gospel."

Respect for religion does not always translate easily into respect for particular nuances of a particular faith's religious laws. One such question is unique to Orthodox Jews and their religious institutions: May an Orthodox Jewish day school or high school (i.e., a "yeshiva," from the Hebrew term "place of sitting to study") award parsonage allowances that may be excluded from gross income to women teaching Judaic studies ("*limmudei kodesh*," or "the study of sacred texts")? Due to the fact that Orthodox Jewish institutions do not ordain women to function as rabbis, women teachers of Judaic studies were thought to be ineligible, and thus the historical answer to this question has been "no." This has been the practice of Orthodox institutions throughout the land.

The author believes this conclusion to be incorrect. Recent years have seen changes in [Section 107](#), new IRS guidance, and a growing practice of awarding women formal certificates authorizing them as role models and Judaic teachers in Jewish schools. In light of these changes, there is ample foundation for women holding such certificates, who teach Jewish subjects in a yeshiva, to be given parsonage by their home institution that will qualify under [Section 107](#).

## The parsonage allowance and ministers of the gospel

The Revenue Act of 1921 was the first to permit the exclusion of the rental value of a minister's home

from his or her gross income. The modern descendant of that provision, [Section 107](#) , provides that the gross income of a "minister of the gospel" does not include either:

- (1.) The rental value of a home furnished as part of his or her compensation.
- (2.) The rental allowance paid as part of his or her compensation, to the extent used 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. [1](#)

The crucial words in [Section 107](#) for purposes of this article are nowhere defined in the law and, indeed, on its face seem inapplicable to non-Christians in general—a "minister of the gospel." Who is a minister of the gospel, and can the term include an Orthodox Jewish woman?

One could read the statute literally to require that the parsonage allowance is available only to the clergy of faiths that preach the Christian gospel, but that is not the reading given by the federal courts. They have consistently held that Congress did not intend to limit the allowance to Christian clergy, and that the clergy of all faiths are entitled to exclude the parsonage allowance from their gross income. [2](#)

However, defining who is a Jewish "minister of the gospel" eligible for the parsonage allowance is a quite difficult task for obvious reasons.

[Rev. Rul. 78-301, 1978-2 CB 103](#) , which concludes that cantors who are provided parsonage allowances may exclude them from gross income, cites [Reg. 1.107-1\(a\)](#) . That regulation provides several examples of specific services that are considered duties of a minister of the gospel for purposes of determining qualification under [Section 107](#) . They include the performance of sacerdotal functions, the conduct of religious worship, the administration and maintenance of religious organizations and their integral agencies, and notably, the performance of teaching and administrative duties at theological seminaries. [3](#) The regulations accompanying [Section 107](#) instruct that [Reg. 1.1402\(c\)-5](#) will apply in determining when services by a minister are in the exercise of his or her ministry. [4](#)

Thus, the IRS has acknowledged that the standards contained in the regulations for ordination vary from denomination to denomination, and that who functions as a minister varies from denomination to denomination. [Rev. Rul. 78-301](#) states that:

[T]here [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 the approach contained in [Rev. Rul. 78-301](#) , the IRS has ruled that a cantor, even though not ordained, qualified for the parsonage exclusion as a minister of the gospel with a mere certification (not required by Jewish law for service as a cantor) of training as a cantor. There is no doubt that a cantor is untrained to conduct many of the rituals and functions that a rabbi is trained to perform. Indeed, a cantor

lacks the central qualification for being a rabbi—the ability to answer questions of Jewish law. Nonetheless, this person is involved in the "performance of the sacerdotal rites of Judaism" and is thus a minister of the gospel for **Section 107** purposes. This is certainly true for a religious teacher in an Orthodox Jewish educational institution as well, at least so long as the educational institution is an integral agency of a religious institution, or itself chartered as a religious institution, as almost all such institutions are.

## 'Private sector' ministers.

There is little authority regarding ministers performing secular services in the private sector. Under **Reg. 1.1402(c)-5(b)(2)**, a minister who performs services for an organization that is neither a religious organization nor one operated as an integral agency, but who does so pursuant to an assignment or designation by his or her church, is performing services in the exercise of his or her ministry. In *Mosley*, **TC Memo 1994-457**, RIA TC Memo ¶94457, 68 CCH TCM 708, the Tax Court heard the case of Baptist ministers working for a non-profit, non-integral organization that was providing support to Baptist missionaries. The court found that, to qualify for **Section 107**, the ministers needed to meet any one of the following three tests of **Reg. 1.1402(c)-5(b)(2)**:

- (1.) A minister performs services for an organization that is neither a religious organization nor operated as an integral agency, being so assigned by a religious body constituting his or her church, is in the exercise of his or her ministry, even though such service may not involve the conduct of religious worship or the ministration of sacerdotal functions.
- (2.) The control, conduct, and maintenance of a religious organization or integral agency that constitutes the exercise of a ministry relates to directing, managing, or promoting the activities of an organization that is under the authority of a church or church denomination. An organization is deemed to be under such authority if it is organized and dedicated to carrying out the tenets and principles of a faith in accordance with other requirements or sanctions governing the creation of institutions of the faith.
- (3.) A minister who conducts religious worship or performs sacerdotal functions does so in the exercise of his or her ministry, whether or not those services are performed for a religious organization.

Thus, a campus chaplain employed by a secular university is entitled to exclude a parsonage allowance, even though he or she does not work for a church.

## How is one ordained to be a minister of the gospels?

The terms "ordination," "commission," or "license" are used in **Rev. Rul. 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." This concept simply does not apply readily to the Jewish tradition. **5** Jewish law differs centrally with other religious legal systems (such as Roman Catholic canon law) that rigidly distinguish between lay and clergy leadership, and which have thus left women

who minister to the community unable to exclude a parsonage allowance. **6** This is fully consistent with the requirement of the 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. **7**

The Jewish legal tradition centrally lacks almost any ecclesiastical function that can be performed *only* by ordained rabbis, and recognizes that lay leadership can rise to the level of clergy in function, 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.

Consider, for example, a simple *responsum* found in the *Iggrot Moshe* ("Epistles of Moses") of Rabbi Moses Feinstein, one of the premier Jewish law decisors in America of the last century. In Yoreh Deah 3:70, Rabbi Feinstein discusses whether a prominent scholar who was never formally ordained may be removed from his rabbinical pulpit merely because he lacks ordination. He answers that such a person has functioned as one who provides ecclesiastical guidance to those who have accepted his authority as one who is wise in matters of Jewish law. That person is therefore entitled to be the spiritual leader of the congregation in question even though he is without any rabbinical ordination. **8** There is no doubt that the man in question also would qualify for the parsonage exclusion under **Section 107 . 9**

In *Wingo*, **89 TC 922** (1987), the Tax Court enunciated a "balancing" test, in which five factors were to be weighed to determine whether an individual was "a duly ordained, commissioned, or licensed minister" under **Section 1402** . Drawing on the regulations, the court said that the factors to be weighed were:

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

The court found that the taxpayer met all five tests. The taxpayer in *Knight*, **92 TC 199** (1989) met only three of the factors, but still was found to be a minister (see below).

In **TAM 200318002** , the IRS applied the test to the faculty and administrative staff of a church-affiliated school. The teachers and administrative staff were hired as teachers and administrators, not as ministers, and none of their prescribed duties were equivalent to the services performed by a minister. Therefore, they were not ministers of the gospel and were denied the exclusion under **Section 107 . 10**

On the other hand, the IRS has recognized (as Rabbi Feinstein has) that when a person holds a position in a religious institution, but is lacking formal ordination to qualify as a rabbi, that person may still be eligible for the parsonage exclusion if he been invested with ecclesiastical authority as "ministers" by the

organization that hires him. **11** A school can decide for itself who functions in an ecclesiastical role, independent of who has formal ordination.

## Women Judaic studies teachers in a yeshiva

An Orthodox Jewish yeshiva is not a congregation. It is a parochial school and seminary devoted to the teaching of Judaic studies in conformity with the doctrines of Orthodox Judaism. Nevertheless, a person hired by the yeshiva who performs all of the functions performed by an ordained rabbi at the yeshiva should qualify for parsonage as a minister under **Section 107**. This result would apply to women who teach Judaic studies, supervise prayers, and provide religious counseling of the kind provided by rabbis in the school, based on the centrally sacerdotal nature of these functions within the yeshiva.

This result would not apply to a teacher of the Hebrew language or even the academic study of the Talmud. However, if the yeshiva expects a woman teacher to conduct what are 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 woman is engaging in conduct the functional equivalent of ordination. This "licensing" in a ministerial function by her employer is what allows the granting of parsonage, and the corresponding exclusion from gross income, as it is the yeshiva that employs her and has functionally "commissioned" her as a minister. It is the school that provides the commission and the religious authorization required by **Section 1402(c)** to be eligible for the parsonage exclusion permitted under **Section 107**.

This situation is not unique to Orthodox Judaism. Consider, for example, the *Knight* case, which involved an unordained Presbyterian "supply pastor." The pastor was a licentiate of the Cumberland Presbyterian Church, (CPC). Among his duties were preaching, conducting the worship service, visiting the sick, and ministering to the needy. All of these were activities that a lay individual could do by the rules of the church, but which ministers did in practice. Applying the *Wingo* balancing test, the court found "that (1) petitioner did not administer the CPC sacraments, (2) petitioner conducted worship services, (3) petitioner did not participate in the 'control, conduct, and maintenance of a religious organization,' (4) petitioner was 'duly licensed,' but not ordained, and (5) CPC considered the petitioner to be a spiritual leader." **12** Having found that the taxpayer was licensed, and because it did not appear that his inability to perform marriages or sacraments, or participate in church government, diminished the ministry that he performed, the court concluded that he was a "minister of the gospel."

These facts present a very close analogue to the role of unordained women employed as Judaic studies instructors and religious role models in Orthodox Jewish yeshivas. Indeed, such women instructors are in a stronger position in that they perform many sacerdotal roles, and are clearly involved in the "control, conduct, and maintenance of a religious organization" but lack only formal ordination. In the Jewish tradition, not only is ordination simply less relevant, but there is no analogous ritual to the "sacraments" that, in almost all Christian denominations, may only be provided by those who are ordained.

While it is the functional commission by the yeshiva and the performance of sacerdotal functions that makes one eligible for the exclusion of the parsonage allowance in the Jewish faith, as discussed in [Rev. Rul. 78-301](#) , a formal certification making it clear which women are qualified for such positions (and which are not) would be very helpful. Examples of such external commissions might include a certificate of achievement provided by the Yeshiva University Graduate Program for Women in Advanced Talmudic Study, and the letter of certification provided by the teacher's seminaries, both shown in Exhibit 1, above. The presence of such certification makes it all the less likely that the right to exclude of a parsonage allowance from gross income would be abused.

## **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 recognize that parsonage allowances may be awarded to 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 yeshivas, some women serve in roles identical to those served by rabbis-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.

### **Exhibit 1. Certification for Women Serving in Orthodox Jewish Yeshivas.**

Orthodox Jewish teachers' seminaries have begun providing certificates like the one immediately following to graduates:

With the aid of the Blessed Lord  
**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 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, \_\_\_\_\_

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

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.

**1**

**Section 107**, as modified by the Clergy Housing Allowance Clarification Act of 2002, P.L. 107-181, 5/21/02. The Act codified **Rev. Rul. 71-280, 1971-2 CB 92**, which limits the exclusion to the housing's fair market value. The legislation was a response to Warren, **114 TC 343** (2000), then before the Ninth Circuit, which indicated that it might consider the constitutionality of the housing allowance exclusion before ultimately dismissing the case. See Bonito and Wittenbach, "Who Qualifies, and When, for the Parsonage Allowance for 'Ministers?'" 14 Exempts 227 (2003).

**2**

The courts have acknowledged that the gospel contemplated by the Code is not the Christian gospel embodied in the first four books of the New Testament. See Salkov, **46 TC 190** (1966). The court explained that "[n]omenclature is not determinative."

**3**

The IRS noted that "Judaism traditionally recognizes a dual ministry of both rabbi and cantor, and may assign on a regular and full-time basis the sacerdotal, religious worship, training, and educational functions of the religion to members of either of these two classes of professionally trained and qualified individuals. Each plays an integral part in the conduct of religious services...." See also Silverman, 57 TC 727 (1972), and Salkov, *supra*, note 2, both of which found full-time cantors to be ministers of the gospel permitted to exclude a parsonage allowance.

#### 4

**Reg. 1.1402(c)-5(b)(2)** provides rules for determining whether services are "performed by a minister in the exercise of his ministry." Among the factors considered by these rules is that all services performed by a minister for an organization which is operated as an integral agency of a religious organization are in the exercise of his or her ministry.

#### 5

The regulations do not require that an ordination, commission, or license come from a higher ecclesiastical body. Instead, the determination depends on the tenets and practices of the particular faith. See **Reg. 1.1402(c)-5(b)(2)**. Courts have consistently acknowledged the absence of a theological hierarchy in the Jewish faith, and have relied upon this fact as a basis for determining that an "ordination" is not determinative as to whether a Jewish individual is a "minister of the gospel." See e.g. Salkov, *supra* note 2. ("Rabbis have long been regarded as ministers, not because they interpret Jewish law but because they perform for their congregations the same sacerdotal functions that are performed by their equivalents in non-Jewish religions.") See also Silverman, *supra* note 3.

#### 6

See Coriden, Green, and Heintschel, *The Code of Canon Law: A Text and Commentary* (Paulist Press, 1985), canons 965, 900, 882, 1003, 1161-1165.

#### 7

See Wingo, **89 TC 922** (1987). As noted by Bonito and Wittenbach, *supra* note 4, 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* (emphasis added).

#### 8

This result derives explicitly from the notations of Rabbi Moses Isserless (d. 1572) on the classical code of Jewish law, *Shulchan Arukh* ("Set Table"), 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 removed readily. Similar such sentiments can be found in the *responsa* of Rabbi Isaac ben Sheshet Perfet (d. 1408) *Rivash* 271.



## 9

On the other hand, courts have repeatedly made it clear that if an ordained minister's basic work was without any religious overtone, he or she is not entitled to the parsonage exclusion, ordination notwithstanding. See Toavs, [67 TC 897](#) (1977); Colbert, [61 TC 449](#) (1974).

## 10

Tanenbaum, [58 TC 1](#) (1972), was a closer case. There, the American Jewish Committee employed an ordained rabbi as director of interreligious affairs. The court ruled that because he was employed to foster understanding of Judaism, not to perform any sacerdotal duties or conduct religious worship, and because the American Jewish Committee was a tax-exempt *educational* (not religious) organization, a parsonage allowance could not be excluded.

## 11

[Ltr. Rul. 5804015160A](#) .

## 12

Knight, [92 TC 199](#) (1989) at 205.