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IN GOD'S NAME

Religion-Based Tax Breaks: Housing to Paychecks to Books

By DIANA B. HENRIQUES

For tens of millions of Americans, the Rev. Rick Warren is best known for his blockbuster spiritual guide, "The Purpose Driven Life," which has sold more than 25 million copies; his success as the founder of the 22,000-member Saddleback Church in Lake Forest, Calif.; and his efforts on behalf of some of the world's neediest people.

But for tens of thousands of ministers — and their financial advisers — Pastor Warren will also be remembered as their champion in a fight over the most valuable tax break available to ordained clergy members of all faiths: an exemption from federal taxes for most of the money they spend on housing, which typically represents roughly a third of their compensation. Pastor Warren argued that the tax break is essential to poorly paid clergy members who serve society.

The tax break is not available to the staff at secular nonprofit organizations whose scale and charitable aims compare to those of religious ministries like Pastor Warren's church, or to poorly paid inner-city teachers and day care workers who also serve their communities.

The housing deduction is one of several tax breaks that leave extra money in the pockets of clergy members and their religious employers. Ministers of every faith are also exempt from income tax withholding and can opt out of Social Security. And every state but one exempts religious employers from paying state unemployment taxes — reducing the employers' payroll expenses but also leaving their workers without unemployment benefits if they are laid off.

Another religion-based tax break — the only one consistently defeated in the courts in recent years — is an exemption from state sales taxes for religious publications but not for secular ones.

This sales tax break has been struck down as unconstitutional in at least five states, most recently in Georgia in February, when a United States District Court judge, Richard W. Story, ruled that "the unique and preferential treatment the state provides to 'religious' literature raises serious constitutional concerns" under the First Amendment clause prohibiting an "establishment" of religion.

Yet a few states still have a sales tax exemption for religious publications. One of them is Florida, where state officials, lawyers for two religious publications and a national religious liberty advocacy group have joined forces to defend the tax break from a constitutional challenge waged almost single-handedly by an Orlando lawyer named Heather Morcroft.

Ms. Morcroft is a Legal Aid staff lawyer who works with foster children. She is a believer in Wicca, which she described as a neo-pagan faith loosely based on the traditions of ancient earth-centered religions, and serves as president of the state's small Wiccan Religious Cooperative.

The cooperative is the formal plaintiff in the pending lawsuit Ms. Morcroft filed almost five years ago to challenge the constitutionality of the Florida exemption. Her arguments echo those that have prevailed in other states: that by exempting religious publications from the sales tax, the government is favoring religious ideas over secular ones, and that tax officials should not be in the business of deciding what publications are sufficiently religious to be exempt.

In contrast to Ms. Morcroft's lonely fight in Tallahassee, Pastor Warren, who declined to be interviewed for this article, had a host of allies when he went to battle to defend the special tax deduction for housing expenses of clergy members. Ultimately, the allies included both houses of Congress and the president of the United States.

The Housing Exemption

The one small passage in the vast federal tax code that originally conferred the housing-expense exemption on clergy members did not cap the deduction. But in 1971, the Internal Revenue Service limited it to the "fair market rental value" of the furnished home, utilities included.

During a routine audit in 1996, according to court documents, the I.R.S. decided that Pastor Warren's housing deduction exceeded the rental value of his new home on Via Del Sol in the rugged Trabuco Canyon, southeast of Los Angeles.

That's when the fireworks began.

Pastor Warren, who gives 90 percent of his considerable income to charities, later explained in an open letter to other ministers that he decided to sue because the housing allowance was the only way small churches could pay their pastors enough to live — and he knew that those ministers could not fight the I.R.S. as he could.

The deduction, usually called the parsonage exemption, is available to ministers, rabbis and other clergy members of all faiths working at houses of worship. It allows them to live in congregation-

owned housing without being taxed on the imputed value of their free housing, as almost all other employees are when they live in company-paid housing.

Since 1954, the provision had also shielded clergy members from taxes on the entire portion of their paycheck designated by their congregations as a housing allowance, whether they spent it on renting an apartment or buying their own home. But the rules the I.R.S. adopted in 1971 limited the deduction to the smallest of three amounts: the "fair market rental value" of the home, the housing allowance paid to the minister or the minister's actual housing expenses.

That ruling lighted the long fuse that, decades later, propelled Pastor Warren into court.

It took four years — and far more of Pastor Warren's money than the $55,300 disputed in the audit — but on May 16, 2000, the United States Tax Court struck down the I.R.S.'s cap and ruled that clergy members could deduct "the amount used to provide a home," however much that might be.

If the story had ended there, Pastor Warren's battle would have been an unequivocal victory for the clergy. But the I.R.S. appealed to the United States Court of Appeals for the Ninth Circuit in San Francisco. And in March 2002, that court raised an unexpected question: was this tax break constitutional? Or did it treat the clergy so favorably that it violated the First Amendment?

The court appointed Erwin Chemerinsky, a law professor then on the faculty at the University of Southern California, to research the constitutional issue and file a friend-of-the-court brief. The court was immediately pelted with defending arguments from lawyers representing almost every religious organization in the country, from the Central Conference of American Rabbis to the Church of the Nazarene.

Some defenders noted that employees required to live in certain places for the convenience of their employer, as pastors are, had long been eligible for tax relief. (A similar exemption is available to some military and diplomatic personnel. But only clergy members can apply it so broadly — for example, applying it even when they work for a church they themselves founded at a location of their own choosing, as was the case with Pastor Warren.)

Others argued that tax deductions favoring religion had been granted for more than 200 years without any objections from the Supreme Court, and this one was no exception. And a few simply pleaded that clergy members deserved the deduction because they were so poorly paid for their contributions to society.

Professor Chemerinsky studied the relevant First Amendment case law, especially the 1989 case Texas Monthly v. Bullock in which the Supreme Court had drawn the line at government's granting a "tax

break to those who spread the gospel that it does not also give to others." He urged the appeals court to find the tax break unconstitutional.

Under I.R.S. rules, he noted, this benefit is available to all clergy members who administer sacraments, conduct worship and direct the spiritual life of a religious institution. "The government thus has to determine what constitutes 'sacraments,' 'religious worship' and the 'spiritual life' of a religion and then to evaluate whether the clergy member is sufficiently engaged in these tasks," Professor Chemerinsky continued.

"It is difficult to imagine a greater entanglement with religion than this evaluation," he wrote in his brief for the court.

Moreover, "the parsonage exemption is a subsidy for religion" and is therefore unconstitutional, he argued. Current Congressional budget records show that the exemption has cost the government as much as $500 million in tax revenue a year, shifting that much of the national tax burden onto other taxpayers.

He did not address the pastoral poverty argument in his court briefs, but in an interview, he noted that poorly paid inner-city teachers and day care workers do not benefit from the parsonage exemption, despite their service to society.

Nor do people at secular nonprofit organizations engaged in humanitarian work. Action Against Hunger U.S.A., based in New York, finances relief programs in Africa, but its director, Cathy Skoula, pays taxes on her entire salary, including what she spends on housing. So does Lawrence Rosenblatt, executive director of the Bowery Residents' Committee, which provides food, shelter and counseling to sick, needy people in Lower Manhattan.

Even amid the distractions of the year after Sept. 11, the constitutional challenge to the clergy housing deduction inspired wide coverage in religious publications and some heated words on radio. Pastor Warren quoted comments made to him by a conservative radio commentator, Hugh Hewitt, who said the issue arose because of "the implacable hostility of the political left to the role of God in the world and the country."

But in fact, the political left and right joined forces with "almost miraculous" speed to defuse this constitutional time bomb, according to Richard R. Hammar, a lawyer and accountant who edits the Church Law and Tax Report newsletter. Within 40 days, the Clergy Housing Clarification Act of 2002 had been approved unanimously in both houses of Congress and signed into law by President Bush.

"It was like the parting of the Red Sea," Mr. Hammar said.

The new law, in Solomonic fashion, affirmed the unlimited deductions ministers like Pastor Warren had taken in the past, but imposed the I.R.S.'s "fair market rental value" restriction on deductions going forward. Satisfied, the tax service withdrew its appeal, ending the constitutional challenge in San Francisco.

Ministers of every faith are also exempt from income tax withholding. And they can opt out of Social Security — an exemption that Mr. Hammar said was probably widely abused.

Until 1968, clergy members were exempt from Social Security unless they joined voluntarily. Since then, they have been automatically covered — but, unlike other citizens, they are allowed to drop out as conscientious objectors if they assert, by a certain point early in their ministry, that they have a religious opposition to receiving public welfare benefits.

"Few people, outside of the Amish, could plausibly say that," said Mr. Hammar, an accountant who also has a law degree from Harvard and attended its divinity school.

Yet his research shows that 3 of every 10 ministers in America have opted out of Social Security. "The only conclusion is that the conscience-based objection is usually really a financial decision," he said.

Because the exemption is irrevocable, why would so many ministers take such a drastic step? Clergy members are considered self-employed and therefore pay a 15.3 percent contribution to Social Security, Mr. Hammar explained. So young ministers on tight budgets sometimes decide, or are persuaded, to drop out and thereby give themselves a 15.3 percent raise.

"The vast majority of clergy who did opt out of Social Security never replaced it with another retirement scheme," he added.

Several times since 1968, religious denominations have urged Congress to rescue these potentially destitute ministers. On three occasions in the last 20 years, most recently in 1999, Congress has done so, opening a two-year window during which ministers who "irrevocably" dropped Social Security could return.

Mr. Hammar said federal law and the laws of every state except Oregon also exempt religious employers from the unemployment compensation laws that cover other employers. Court rulings widened this exemption to include religious-operated schools, he said, and in 1997 Congress expanded it further to include schools "operated for a religious purpose" but not actually controlled or affiliated with a religious denomination or institution.

As a result, he said, state courts have generally determined that workers who are laid off from these

exempt religious employers cannot collect jobless benefits.

Breaks on Sales Taxes

In her 20 years as a lawyer, Heather Morcroft had never argued a case before the Florida Supreme Court.

But there she was, on June 9 — standing alone on her side of the lofty courtroom in Tallahassee to challenge the constitutionality of a Florida law that exempts "religious publications" from the state sales tax.

As Ms. Morcroft sees it, this exemption not only infringes on the liberty of those faiths with writings that may not be deemed sufficiently religious to be exempt, but it also puts government in the role of defining a religious publication and then favoring that publication over secular ones.

None of that, she says, should be allowed under the First Amendment, which provides, in part, that "Congress shall make no law respecting an establishment of religion."

Indeed, in that 1989 case in Texas, the United States Supreme Court ruled that the government could "not place its prestige, coercive authority, or resources behind a single religious faith or behind religious faith generally" without violating the Constitution.

Some legal scholars argue that there was no clear majority opinion, and hence no clear judicial guidance, in the Texas case.

But Ms. Morcroft noted in her lawsuit that since the Supreme Court decision in the Texas case, federal and state courts in North Carolina, Pennsylvania, Rhode Island and South Carolina, as well as Georgia, had "found that a sales tax exemption for items based on their religious content is unconstitutional."

Florida is one of several states that still have some sort of sales tax exemption for religious publications.

Lawyers defending the exemption, which costs the state just under $10 million each year, say it is consistent with a long list of laws, adopted and upheld since the nation's birth, that have benefited religion in some way. Governments "have found it prudent to avoid entanglement of religion with the state taxation process by providing exemptions," argued Kevin Shaughnessy, a lawyer in the Orlando office of Baker & Hostetler who represents The Florida Baptist Witness and The Florida Catholic, which benefit from the exemption. Similar arguments were made by Liberty Counsel, a religious freedom advocacy group in Orlando.

Most states give religious groups some sort of broad sales tax exemption, but most do so simply by including religious organizations in omnibus exemptions that cover sales to, and sometimes purchases from, nonprofit groups of all sorts.

But a few states go further, exempting specific kinds of religious publications from sales taxes no matter who buys or sells them, said John L. Mikesell, a professor at Indiana University and the co-author of a widely used primer on sales taxation. They include Florida, Massachusetts and Texas, which revised its statute after the Texas Monthly case.

Several other states grant special treatment to sacramental equipment and supplies, and to materials a private contractor buys for use on many religious construction projects.

The difficulty of applying these exemptions in real life was revealed in Tallahassee, when Justice Barbara J. Pariente quizzed James A. McKee, the state attorney defending the Florida statute, about how the state went about "deciding whether my Bible is really a religious text, or if it is historical or something else."

Mr. McKee quickly assured her that the revenue department left those constitutionally sensitive "content" decisions to the booksellers. "It's similar to a statute that exempts certain food items," he explained. "The grocery store is actually the one that makes the determination."

Sounding a little shocked, Justice Pariente asked, "So they can say anything is religious and there is no challenge to it?"

Mr. McKee did not directly respond to her question — but booksellers have.

While there is no way of knowing how small bookshops decide what is an exempt "religious publication," big national booksellers have developed definitions to guide their stores in Florida and other states with similar exemptions.

The problem is, their definitions are different.

Barnes & Noble recognizes a narrow category that includes the Bible and a short list of other "sacred texts," including the Talmud and the Koran, according to Mary Ellen Keating, a company spokeswoman.

At Borders, the exemption is broader, including books on theology and religious history as well as Bibles, hymnals, prayer books and the sacred texts of all religions, according to Anne Roman, a spokeswoman there.

Hearing that, Ms. Morcroft said she was not surprised at the disparities. “I have friends who shop at a local Christian bookstore,” she said. “They say the only thing that’s ever tax-exempt there is the Bible.”

Like the many other tax and regulatory exemptions that have become available to religious organizations in America, the tax breaks for clergy housing expenses and religious publications benefit religion in ways that some critics say go beyond the limits of the Constitution.

Until several years ago, “it was inconceivable for most to think that religion might well be aggressively expanding its power in a way that is harmful to the public good,” said Marci A. Hamilton, a law professor at the Cardozo law school at Yeshiva University in New York and the author of “God vs. the Gavel: Religion and the Rule of Law,” which is critical of many religious exemptions, particularly in the areas of land use and family law.

But now, Professor Hamilton said, the power of religious entities “is at its apex.”

Defenders of these exemptions deny that they raise any questions of excessive power or constitutional violations. “Government deregulation of religion is consistent with a broader pattern of American government going back to the founding,” said Anthony R. Picarello Jr., vice president and general counsel of the Becket Fund for Religious Liberty, a legal advocacy group in Washington.

“Providing special treatment is not always constitutionally required,” he said, “but it is constitutionally permissible.”

Andrew Lehren and Donna Anderson contributed to this article.