SPECIAL SUPPLEMENT: KEY POINTS FROM THE NOVEMBER 2013 WISCONSIN FEDERAL DISTRICT COURT HOUSING ALLOWANCE RULING

What churches and clergy must know about the decision in Wisconsin

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On November 22, 2013, federal district court judge Barbara Crabb of the District Court for the Western District of Wisconsin (a President Carter appointee) struck down the ministerial housing allowance as an unconstitutional preference for religion. The ruling was in response to a lawsuit brought by the Freedom From Religion Foundation (FFRF) challenging the constitutionality of the housing allowance and the parsonage exclusion. Judge Crabb stayed the decision, pending an appeal to the Seventh Circuit Court of Appeals in Chicago. The government filed a notice of appeal in the housing allowance case on January 24, 2014. (For more information visit **www.pbucc.org**.)

Here are five things church leaders should note about this ruling.

1. **Federal District court in Wisconsin rules Housing Allowance is an unconstitutional preference for Religion**

The Wisconsin court concluded that the housing allowance exclusion under section 107(2) is an unconstitutional preference for religion, since the same benefit is not provided to other taxpayers. The court relied on a 1989 decision by the U.S. Supreme Court in which the Court ruled that a Texas statute exempting from the state sales tax periodicals and books "published or distributed by a religious faith" was an unconstitutional preference for religion. (*Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989)*). The Supreme Court concluded that tax exemptions that include religious organizations "must have an overarching secular purpose that equally benefits similarly situated nonreligious organizations." To illustrate, the exemption of church property from taxation is constitutionally permissible because state laws exempt a wide range of nonreligious properties from taxation. In contrast, the housing allowance applies only to ministers.

The Wisconsin court conceded that there are other provisions in the tax code that recognize housing allowances, and it referred specifically to state department employees and the military. It noted that the Supreme Court in the Texas Monthly decision acknowledged that a tax exemption benefiting religious groups could survive a challenge under the establishment clause if the exemption was "conferred upon a wide array of nonsectarian groups as well." However, the Supreme Court "rejected the argument that it was enough to point to a small number of secular groups that could receive a similar exemption for a different reason."

2. **"Parsonage Allowance" not ruled unconstitutional by Wisconsin Federal Court**

While the FFRF challenged the constitutionality of both sections 107(1) (parsonage allowance) and 107(2) (housing allowance), it ultimately narrowed its challenge to section 107(2) which relates to housing allowance for ministers not living in parsonages. The parsonage exclusion remains unchallenged.

3. **Effective date and an appeal**

The court ruled that the IRS and Department of the Treasury should not enforce section 107(2). But it added that its ruling "shall take effect at the conclusion of any appeals… or the expiration of the deadline for filing an appeal, whichever is later." An appeal by the IRS and Department of the Treasury would be to the Seventh Circuit Court of Appeals in Chicago and could take up to a year or more to resolve.

It is possible that a federal appeals court will reverse the Wisconsin court's ruling and uphold the constitutionality of the housing allowance. If so, it won't be the first time a ruling by Judge Crabb was reversed on appeal. In 2011 a three-judge panel of the Seventh Circuit Court of Appeals unanimously reversed her opinion that the National Day of Prayer violates the First Amendment ban on the establishment of religion.

Further, there are substantial arguments supporting the constitutionality of the housing allowance. Of course, those arguments are not dispositive, as the Wisconsin case demonstrates. But they were given short shrift by Judge Crabb, and her perspective may not be shared by the appeals court. It is also possible that the appeals court will revisit the issue of standing and conclude that the FFRF lacks standing to prosecute the case.

4. **Application in other states**

A ruling by a federal district court judge in Wisconsin is not binding on other courts and does not apply to ministers in other states. If the ruling is appealed and affirmed by the Seventh Circuit Court of Appeals, it will apply to ministers in that circuit (Illinois, Indiana, and Wisconsin).

5. **Housing Allowances for 2014**

Churches should continue to designate housing allowances for ministerial employees for 2014, and church pension plans should continue to designate housing allowances for retired ministers. Such allowances will continue to be valid in all states outside of the Seventh Circuit (Illinois, Indiana, and Wisconsin) and to ministers in the Seventh Circuit so long as the district court's ruling is reversed on appeal or the appeals court does not render an opinion in 2014.

Conclusions

What can churches and ministers do to minimize the impact of the Wisconsin court's ruling? Consider the following:

- The court's ruling has been appealed to the Seventh Circuit Court of Appeals in Chicago. Any developments will be reported on **www.ChurchLawAndTax.com**.
- Remember that the Wisconsin court postponed its ruling while an appeal is pending, so churches affected by that court's ruling should continue to designate housing allowances.
- A ruling by a federal district court judge in Wisconsin is not binding on other courts and does not apply to ministers in other states. If the ruling is appealed and affirmed by the Seventh Circuit Court of Appeals, it will apply to ministers in that circuit (Illinois, Indiana, and Wisconsin). It would become a national precedent binding on ministers in all states if affirmed by the U.S. Supreme Court (an unlikely outcome, since the Court receives 10,000 appeals each year and accepts 75 to 80 of them).