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COMMENTARY

IRC § 119: The Solution to the Shortcomings of IRC § 107

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IRC § 107 allows ministers of the gospel to exclude from income the rental value of employer provided housing, the home they rent, or even ones they own, even if the housing or housing allowance is intended as compensation.¹ § 107 was enacted in 1921 in response to an IRS ruling that excluded ministers from rulings that allowed secular employees to omit the value of housing from income when they were required to live onsite for their work.² In 1954, to reduce litigation, Congress enacted IRC § 119, codifying the rules that apply to secular employee housing.³ Section 119 allows employees to exclude housing only when they are required to live on-site for the employer's convenience.⁴ Instead of moving § 107 to § 119, which makes logical sense, Congress expanded § 107 to allow tax-free housing for ministers, regardless of where they lived.⁵ This raises serious horizontal equity concerns because similarly situated taxpayers are treated differently. Secular taxpayers who receive housing allowances must pay tax on them, while ministers do not. To address this concern, I propose moving § 107 into § 119 and making it more consistent with the general rules applicable to secular employees.

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¹ 26 U.S.C. § 107.

² *Gaylor v. Mnuchin*, 919 F.3d 420, 428 (7th Cir. 2019).

³ Chodorow, Adam, Amicus Curiae Brief of Tax Law Professors in Support of Appellees, 4 (June 22, 2018). Available at SSRN: <https://ssrn.com/abstract=3203100> or <http://dx.doi.org/10.2139/ssrn.3203100>.

⁴ 26 U.S.C. § 119.

⁵ Chodorow, Adam, Amicus Curiae Brief of Tax Law Professors in Support of Appellees, 4 (June 22, 2018). Available at SSRN: <https://ssrn.com/abstract=3203100> or <http://dx.doi.org/10.2139/ssrn.3203100>.

IRC § 107 raises horizontal equity concerns because individuals in similar circumstances, that is, those who cannot meet the strict § 119 standards are treated differently from ministers who have their own special rule in § 107. For example, consider police officers or healthcare workers who must live in a certain area and may be called at any time of the day for work. Those workers do not satisfy the § 119 requirements and therefore would have to include housing allowances in income. In contrast, under § 107, ministers can exclude such housing allowances. Section 107 also creates equity issues between different religions because of their different definitions of minister. For all religions, just the minister would benefit from § 107. However, some religions, such as the Church of Christ believe that all baptized believers are ministers.⁶ In 2003, Pepperdine University, a college associated with the Church of Christ, released a tax form showing how both professors and administrators qualified for § 107.⁷ Most other university professors cannot take the § 107 exemption because they do not teach at a university associated with a religion that believes all baptized believers are ministers. This problem occurs because the definition of a minister, for tax purposes, is broad.⁸ Merging § 107 into § 119 could have mitigated many of these concerns.

Another problem with § 107 is that it provides an indiscriminate subsidy because ministers who make a lot of money will benefit much more than lower-income ministers, especially when part of the intent for § 107 was to help ministers with lower salaries. Ministers who make good money and own multi-million-dollar houses can exclude much more money from their gross income compared to ministers who do not make a lot of money. Part of the motivation to add on to § 107 in 1954 was to subsidize ministers who have lower salaries, however, the provision helps ministers despite the level of their salary.⁹ Merging § 107 into § 119 with an addition of a phase-out will help restore § 107's intent of helping ministers with lower salaries.

To address these concerns, Congress should repeal § 107 and add a new subsection to § 119 that applies to ministers. It should also bring the requirements closer in line with those applicable to lay employees. To consider worries that only certain denominations typically provide on-site housing, Congress could look to the rules in § 119(d), which apply to educational institutions and provide greater leeway. Section 119(d) allows employees of an educational institution to exclude housing located on, *or in the proximity of*, the

⁶ Joann Groff & Sarah Carrillo, *What is a Minister?*, PEPPERDINE UNIVERSITY GRAPHIC (Oct. 30, 2003), <http://pepperdine-graphic.com/what-is-a-minister/>

⁷ *Id.*

⁸ Please see Paul G. Schloemer & Ryan Wilson, *Minister Housing Allowance Presents New Challenges*, THE CPA JOURNAL ONLINE (Dec. 2005), <http://archives.cpajournal.com/2005/1205/essentials/p44.htm>. (discussing the broad nature of the “ministers of the gospel” definition through court cases over the years).

⁹ Adam Chodorow, *The Parsonage Exemption*, 51 U.C. Davis L. Rev. 849, 858 (2018).

university. Congress should enact similar for § 119(e), a new section added for ministers of the gospel to say that they need to be located on, or in the proximity of, the church. Congress should also define proximity, perhaps creating a safe harbor. For instance, Congress could require ministers to live no more than 3 miles from the church or other religious institution at which they work as the crow flies or 4 miles as a car drives.

Additionally, to ensure that the subsidy goes to those in need, Congress should include a phase-out. This phase-out could be similar to other phase-outs in the tax code, such as IRC § 221 for interest on educational loans.¹⁰ For instance, it could say “The amount which would be allowable as an exclusion from the adjusted gross income shall be reduced by the amount determined which bears the same ratio to the amount which would be so taken into account as the excess of the taxpayer’s adjusted gross income for such taxable year, over \$75,000 (\$150,000 for joint returns), bears to \$25,000 (\$50,000 for joint return).” This will essentially limit the amount a taxpayer can exclude from their adjusted gross income if they make more than \$75,000 (\$150,000 for joint returns) and exclude any minister who makes more than \$100,000 (\$200,000 for joint returns), adjusted for inflation, from being able to exclude to help limit this tax benefit to those who need it. So, for every dollar that a minister of the gospel makes over \$75,000, they would be allowed to exclude a smaller percentage than the full amount until they make \$100,000, in which case they could no longer exclude anything from their income. Because limiting any statute that has religion in it can come with backlash, there can also be a grandfather-styled rule for those already using § 107. This rule would gradually limit the amount of exclusion for those who are using § 107 but would otherwise be unable to use § 119(e) with the new rules, by reducing the amount they exclude per year, on a 5-year basis. For example, the amount a minister could exclude under § 107 is reduced by 20% each year, until it reaches 100% on the fifth year. By the year 2030, the limitation would end, and § 119(e) would be the sole tax provision for ministers excluding housing from income.

This proposal would bring the treatment of ministers in line with other secular employees, thus addressing the initial justification for Section 107, and tie the benefit to the fact that housing serves a function other than pure compensation.

¹⁰ 26 U.S.C. § 221.