

Housing Allowance Case Q&A

Question 1: Was there a recent case that ruled the housing allowance unconstitutional?

Answer 1: Yes, on October 6, 2017, the federal district court for the Western District of Wisconsin declared the tax-free housing allowance for clergy under Section 107(2) of the Internal Revenue Code unconstitutional. The court entered its final order in the case on December 13, 2017, which enjoins the government from enforcing Code Section 107(2). However, the court stayed, i.e., delayed, the effect of the order until 180 days after the conclusion of all appeals.

Question 2: Was there an earlier similar case that ruled the housing allowance unconstitutional?

Answer 2: The same court reached a similar decision in 2013, and that decision was later reversed on appeal.

Question 3: Does this decision affect clergy who live in parsonages?

Answer 3: This recent decision, like the earlier case, does not impact the constitutionality of in-kind church-provided housing, often called a parsonage, manse, or rectory (provided under Code Section 107(1)). The decision only affects cash housing allowances (including cash allowances for utilities and furnishings for parsonages, manses, etc.).

Question 4: What is the name and location of the case?

Answer 4: The case is *Annie Laurie Gaylor, Freedom From Religion Foundation et al v. Steve Mnuchin et al* (*Gaylor v. Mnuchin*, for short), and was decided by the Federal District Court of the Western District of Wisconsin, Case: 3:16-215.

Question 5: How is this recent case different from the 2013 case?

Answer 5: The plaintiffs filing suit, officers of the Freedom From Religion Foundation (FFRF), are the same. This is their third challenge to the clergy housing allowance. When the plaintiffs' favorable decision in 2013 at the Wisconsin District Court was reversed by the Seventh Circuit U.S. Court of Appeals in Chicago, the Seventh Circuit held that the plaintiffs lacked standing to sue. This meant that the plaintiffs that filed suit had not actually been harmed (i.e., they hadn't been actually denied by the IRS from using the housing allowance exclusion to their own income), and therefore could not bring suit in court. In the current case, the District Court ruled that plaintiffs have cured their lack of standing from the earlier case. The plaintiffs were granted a housing allowance by FFRF, paid income taxes on the housing allowance, sought a refund of those taxes paid, and arguably have been denied tax refunds by the IRS.

Question 6: What is likely to happen with this case and the housing allowance in general, in the future?

Answer 6: The decision almost certainly will be appealed to the Seventh Circuit U.S. Court of Appeals. On appeal, the question of whether plaintiffs have standing might again be addressed by the court. If not, or if the court agrees that the plaintiffs now have standing, the Seventh Circuit would then likely make a decision on the issue of the constitutionality of the housing allowance. If the decision is in favor of the plaintiffs, the government would likely appeal to the Supreme Court. **It could take a few years or more before a final decision is reached.** In the meantime, or as a result, the Church Alliance, which is a coalition of chief executives of 37 church benefit boards, could seek legislative options to remedy, if possible, or mitigate the impacts on clergy retirement and welfare benefits of such a ruling.

Question 7: What can the church benefits community do while case is ongoing?

Answer 7: As it did in the earlier case, the Church Alliance will likely seek to file a friend of the court (*amicus curiae*) brief in the Court of Appeals in support of the constitutionality of the housing allowance.

Question 8: Can clergy continue to apply the housing allowance exclusion until this decision is fully resolved in the courts?

Answer 8: We believe so, given that the Federal District Court in Wisconsin stayed the effect of its final order until 180 days after appeals are exhausted.

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The Church Alliance advocated for changes to the church plan definitions in ERISA and the Code. As a result of these efforts, Congress revised the definition of "church plan" in both ERISA and the Code when it passed the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) to make it clear that a church plan can provide retirement and welfare benefits to employees of all church agencies.

The Church Alliance continues to ensure that benefit-related legislative and regulatory initiatives fully address the unique nature of church plans. In addition, in some cases the Church Alliance has acted in a "self-regulatory" manner by advocating for changes that actually limited the tax rules and regulations that govern church benefit plans and clergy participants. As a result, over the years, the Church Alliance has been involved with numerous pieces of legislation (and legislative proposals) that directly impact church benefit plans and programs.

For more information: church-alliance.org