

## **Oops, I Forgot To Create Standing: A Challenge To The Parsonage Exemption Fails.**

Section 107 of the Code creates an exemption for “a minister of the gospel:” who can exclude from income either the value of housing provided as part of his compensation or the value of a housing allowance.

Of course, there’s an obvious question: how is this constitutional?

The Freedom from Religion Foundation, a group of agnostics and atheists, has been mounting a challenge to this parsonage exemption as a violation of the Establishment Clause. On the merits, they probably have a decent argument. But to reach the merits they have to demonstrate standing, which can be tricky in Establishment Clause cases because the mere fact that someone is taxpayer is not sufficient. Last week, the Seventh Circuit concluded that the group had failed to establish standing. *Freedom from Religion Foundation v. Lew*, 2014 U.S. App. LEXIS 21526 (7th Cir. Nov. 13, 2014).

The plaintiffs had argued that they were denied a benefit, the exemption for an employer-paid housing allowance, on religious grounds. As the Seventh Circuit noted, this is a viable way to establish standing to challenge a tax benefit provided to a religious group. *Freedom from Religion Foundation*, 2014 U.S. App. LEXIS 21526, slip op. at \*8-\*9 (citing *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1440 (2011)).

While the plaintiffs’ theory on standing was sound, they lost for the simple reason that they had not been denied the exemption, as they never requested it. *Freedom from Religion Foundation*, 2014 U.S. App. LEXIS 21526, slip op. at \*9

Plaintiffs could have created standing either by claiming the benefit and proceeding to tax court when it was disallowed, or by paying tax on their allowances and then seeking a refund. *Id.*, slip op. at \*9, n. 3. Since the plaintiffs had not been denied the benefit, they did not have the type of concrete injury that would establish standing.

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