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Religious Organizations, Refuge for Undocumented Immigrants, and Tax Exemption

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For many houses of worship,¹ the Biblical injunction, “You should not wrong a stranger or oppress him, for you were strangers in the land of Egypt” (Exodus 22:21, JPS), constitutes an important religious doctrine. The Trump Administration has announced plans for aggressive enforcement of immigration laws, plans that are expected to expand massively the number of people detained and deported. This new policy has forced many houses of worship and other religious organizations to consider whether their beliefs call upon them to grant refuge or so-called sanctuary to undocumented immigrants.

Under section 8 U.S.C. sec. 1324, harboring undocumented immigrants carries the potential for both fines and imprisonment. An organization can lose its exempt status if its purpose is illegal. Moreover, illegal activity is deemed not to further exempt purpose, and an organization can also lose its exempt status if a substantial part of its activities is not in furtherance of its exempt purpose. As explained further below, the issue for these houses of worship and other religious organizations is much more likely to be a question of substantiality than of purpose.

Revenue Ruling 75-384 offers important guidance.² It involved an organization formed to educate the public on the principles of pacifism and nonviolent action, including civil

¹ Although the IRS interprets the term “church” to include all houses of worship, I prefer to use the more general term.

² A revenue ruling is an official interpretation by the IRS of the Internal Revenue Code. See *Understanding IRS Guidance: A Primer*, available at <https://www.irs.gov/uac/understanding-irs-guidance-a-brief-primer>.

disobedience. The ruling explains that no section 501(c)(3) organization can have an illegal purpose. The ruling's analysis, however, emphasized the group's primary activity of undertaking protest demonstrations and nonviolent actions, including deliberately blocking traffic, disrupting the work of government and preventing the movement of supplies, all breaches of the peace in violation of local ordinances. The ruling concluded that the organization's activities "demonstrate an illegal purpose which is inconsistent with charitable ends." The Tax Court in *Church of Scientology of California v. Commissioner* similarly concluded that pervasive illegal activities, including a number of felony convictions, constituted an illegal purpose and that the organization's claimed status as a church did not protect it from application of the illegality doctrine.³

Giving refuge to undocumented immigrants, however, is extremely unlikely to become a primary activity of a house of worship or other established religious organization such that it becomes one of the organization's purposes. Even if the refuge activity does not constitute one of the organization's purposes, however, the question of substantiality remains.

According to a 1985 IRS Exempt Organization Continuing Professional Education (CPE) chapter and General Counsel Memorandum ("GCM") 34631 (October 4, 1971), the nature of the acts is as important as their quantity in any determination of substantiality.⁴ The GCM involved an organization alleged to be involved with organized crime, which was said to have used force and violence to silence a newspaper opposed to it. As examples, the CPE text and the GCM discuss robbing banks and planned violence or terrorism.

Giving refuge to the undocumented immigrant involves no violence. Still, a 1994 CPE chapter observed, that "illegal activity may be so serious that even an isolated incident would outweigh the organization's other activities, and be a basis for revocation or denial of exemption, regardless of the nature and extent of its activities as well as asserting that the

³ See *Church of Scientology of California v. Commissioner*, 83 T.C. 381 (1984). The Ninth Circuit upheld revocation of exemption, but on different grounds, namely inurement, which means excessive benefit to insiders. See *Church of Scientology of California v. Commissioner*, 823 F.2d 1310 (9th Cir. 1987). The Church of Scientology has since regained tax exempt status in a settlement with the IRS.

⁴ Neither of these sources is official authority, and neither is published today, but exempt organization lawyers look to both as important sources of IRS thinking. The CPE texts were written by lawyers in the IRS Office of Chief Counsel to train agents. The 1985 chapter, entitled "Activities That Are Illegal or Contrary to Public Policy," is available at <https://www.irs.gov/pub/irs-tege/eotopicj85.pdf>. General Counsel Memoranda are documents that were written by the lawyers in the IRS Office of Chief Counsel to consider and explain the reasoning behind proposed revenue rulings. They are available on services such as Lexis and Westlaw.

government “has an interest in not subsidizing criminal activity.”⁵ It noted as well that illegal activity can be so blatant as to demand action by the IRS.

As noted earlier, the applicable statutory provisions for harboring undocumented immigrants include criminal penalties with heavy penalties. More specifically, harboring an undocumented immigrant can, for each immigrant harbored, carry not only a fine, but also a prison term of up to five years. 8 USC sec. 1324(a)(1)(B)(ii). While any result would, of course, depend on the particular facts and circumstances of a refuge program, revocation based on serious or blatant illegal activities seems to me unlikely as a practical matter. Again, this activity does not seem to me to be equivalent to robbing banks or engaging in violence or terrorism. According to press reports, President Trump’s Department of Homeland Security has announced that it will continue the policy of churches and schools being off-limits for enforcement actions.⁶ GCM 37111 (May 4, 1977), which involved a trade association exempt under section 501(c)(6), states that an activity should be judicially determined to be illegal before revocation of exemption on the basis of illegal activity. Judicial determination, at least currently, seems unlikely for a house of worship or religiously affiliated school offering sanctuary.⁷

⁵ The 1994 chapter, entitled “Illegality and Public Policy Considerations,” is available at <https://www.irs.gov/pub/irs-tege/eotopicl94.pdf/>.

⁶ A fact sheet issued by the Department of Homeland Security states that earlier guidance regarding sensitive locations remains in effect. See <https://www.dhs.gov/news/2016/07/15/fact-sheet-frequently-asked-questions-existing-guidance-enforcement-actions-or>. See also CNN, Trump Sets Stage for Mass Deportations, <http://www.cnn.com/2017/02/21/politics/dhs-immigration-guidance-detentions/index.html>. Ironically, if enforcement actions were later initiated against houses of worship, the earlier refuge might hurt the house of worship. In *United States v. Costello*, 666 F.3d 1040, 1050 (7th Cir. 2012), the court wrote. “Some cases, in order to refine the definition of ‘harboring,’ adopt the formula ‘substantial facilitation of’ or ‘substantially to facilitate’ the alien’s presence, . . . which strikes us as too vague to be a proper gloss on a criminal statute. . . . A better gloss than ‘substantial facilitation’ would be providing (or offering—for remember that the statute punishes the attempt as well as the completed act) a known illegal alien a secure haven, a refuge, a place to stay in which the authorities are unlikely to be seeking him.”

⁷ IRS reaction to campaign intervention by houses of worship may be informative. Section 501(c)(3) denies exemption to any organization that intervenes in any political campaign on behalf of or in opposition to any candidate for public office. For a number of years, ministers at churches who oppose this prohibition have openly violated it on Pulpit Freedom Sunday. As far as is known publicly, the IRS has not taken action against any of these churches. For election cycles in 2004, 2006, and 2008, cycles during the 2000’s, the IRS conducted a Political Activities Compliance Initiative and found violations of the campaign intervention prohibition, both large and small, among section 501(c)(3) organizations generally and among houses of worship. The IRS did not revoke the exemption of any house of worship for these violations. For further discussion of both Pulpit Freedom Sunday and the Political see Ellen P. Aprill, *Why the IRS Should Want to Develop Rules Regarding Charities and Politics*, 62 CASE WESTERN L. REV. 643 (2012), also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1927611.

The Church Audit Act, if applied, would itself impose procedural hurdles on any examination of houses of worship (but not other religious organizations) offering refuge to immigrants.⁸ Many years after the decision in *United States v. Living Word Christian Center*,⁹ which halted a church investigation based on inconsistency with statutory requirements that a high level Treasury official authorize any church inquiry, we are still waiting for final regulations naming the IRS official who can authorize such examinations. Moreover, it is possible that religious congregations could use the Religious Freedom Restoration Act to protect their actions.¹⁰

Even in the absence of final regulations, however, the IRS in 2014 wrote a letter to the Justice Department that it had processed cases involving churches under the Church Audit Act, treating the Commissioner of TEGE (Tax Exempt and Government Entities), directly or together with a determination by the Director, Exempt Examinations, as the required high level Treasury official.¹¹ Thus, the IRS may be continuing to conduct church audits.

In addition to the issues of purpose and substantiality involving of illegality, another closely related doctrine, the public policy limitation, could also come into play, although this possibility seems to me particularly unlikely. *Bob Jones University v. United States*¹² denied exemption to a religious university that discriminated on the basis of race on the grounds that a

⁸ Under the Church Audit Act, Section 7611 of the Internal Revenue Code, an inquiry or examination of a church requires a written finding based on “reasonable belief” by “an appropriate high-level Treasury official” and a written notice to the church before beginning such inquiry.

⁹ *United States v. Living Word Christian Center*, 103 AFTR 2d (RIA) 714 (2009), held that the delegation to the Director of Exempt Organizations, Examinations to make the written finding, a delegation the IRS initiated after reorganization of the agency such that the official named in the regulations then promulgated under section 7611 no longer existed, did not meet the statutory requirement of a high-ranking official. Proposed regulations were issued in 2009, but met with a great deal of objection as to the fact that the officials named, as described above, were with the Exempt Organization function rather than an official at a higher level. Finalizing these regulations has appeared on the IRS Priority Guidance List for a number of years, but no action has been taken.

¹⁰ 42 U.S.C. § 2000b. Under the Religious Freedom Restoration Act, “government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,” unless the action “is in furtherance of a compelling government interest” and “is the least restrictive means of further that government interest.” *Id.* It is hard to predict whether enforcement of immigration laws against religious congregations would be deemed to meet both prongs of the exception.

¹¹ June 27, 2014 Letter to Tamara W. Ashford, Acting Assistant Attorney General, Tax Division, Department of Justice from Mary A. Epps, Acting Director, EO Examinations, available at <http://www.taxnotes.com/tax-notes-today/exempt-organizations/irs-updates-doj-church-political-activities-enforcement/2014/08/12/2137996> (subscription required).

¹² 461 U.S. 574 (1983).

tax-exempt charity must serve a public purpose and not be contrary to established public policy. The Court found that racial discrimination in education to be “contrary to a fundamental public policy,” violating “deeply and widely accepted views of elementary justice.”¹³ The *Bob Jones* opinion did not give any clear guidance as to when a public policy becomes “fundamental.” Also, the Court observed in a footnote that the case dealt only with religious schools, not with churches or purely religious institutions.¹⁴ Furthermore, with possibly a few isolated exceptions,¹⁵ the IRS has not extended the public policy limitation beyond racial discrimination in education. Given that President Trump’s immigration enforcement initiatives are new and a break with the previous administration, it is hard to imagine that opposition to this Trump administration change would be deemed to violate fundamental public policy.

Nonetheless, any house of worship or other religious organization deciding to offer refuge to undocumented immigrants should realize that such a decision is not without some risk. It should proceed with care and caution. The organization should carefully document the religious doctrines on which it is basing its decision, the criteria as to which undocumented immigrants they will or will not admit, and the limits they will put on refuge.¹⁶ It should also seek legal advice on its particular situation.

¹³ 461 U.S. at 593.

¹⁴ 461 U.S. at 604.

¹⁵ In one private letter ruling, the IRS relied on *Bob Jones University* to deny exemption to a trust that restricted beneficiaries to “worthy and deserving white persons” who resided in a certain city and lacked sufficient income. PLR 8910001 (1988). In two private ruling letters, the IRS denied exemption to religious groups that practiced polygamy on the basis of both illegal activity and inconsistency with public policy, without distinguishing the two bases for denial. PLR 201410047 (2013); PLR 201325015 (2013). A private letter ruling is a written statement issued to a taxpayer that interprets and applies tax laws to the taxpayer’s specific set of facts. Private letter rulings, although publicly available in redacted form from various tax services, may not be relied upon as precedent. See *Understanding IRS Guidance: A Primer*, available at <https://www.irs.gov/uac/understanding-irs-guidance-a-brief-primer>. Private letter rulings on exempt organizations issues are now issued from the IRS Office of Chief Counsel, but beginning in 2014, they were issued by the Exempt Organization division on the Commissioner’s side of the IRS. See Law360, *IRS realignment Shifts Exempt Entities Guidance Duties*, available at <https://www.law360.com/articles/601524/irs-realignment-shifts-exempt-entities-guidance-duties..>

¹⁶ The Chicago public school system, for example, has announced that it will deny access to federal immigration agents unless served with a criminal warrant. See CNN, *Chicago public schools say they will keep ICE agents out*, available at <http://www.cnn.com/2017/02/22/us/chicago-public-schools-immigrant-students/>.