

AN APPROACH TO THE TUITION CRISIS

BY JEFFREY I. ZUCKERMAN

There would likely be unanimous agreement among Orthodox Jews in the United States that the cost of educating our children is an increasingly crushing burden upon families and communities. Even families that have achieved unequivocal economic success by general American standards, with incomes of \$150,000 or more per year, are often overwhelmed by the need to spend 50 or 60 thousand after-tax dollars on tuition for their four or five children. Larger families, of course, face even higher tuition costs; and families with smaller incomes may find the burden even more overwhelming.

The tuition-imposed stress on families is not healthy. It also leads parents to work long hours or multiple jobs, as a result of which they cannot spend the appropriate quantity and quality of time with their children. Moreover, some Jewish children are not attending Jewish schools because their parents feel that they cannot afford the tuition. Leading *mechanchim* (educators) and other communal leaders agree that we have a crisis on our hands.

A few ways to solve or ameliorate this problem have been suggested. One serious possibility, however, has received almost no consideration: establishing that tuition payments for religious instruction are tax-deductible as charitable contributions. This would reduce the after-tax cost of day school and yeshiva tuition by over one-third. And before anyone says this is impossible, please note that, since 1993, IRS has permitted members of the Church of Scientology to deduct their payments for religious education as charitable contributions.

First let me explain a little law and history, and then I shall turn to what we need to do.

Under federal and state law, contributions to certain types of organizations are tax-deductible. In general, however, payments to such organizations in exchange for goods or services are not tax-deductible. These are known in legalese as "*quid pro quo*" payments. Thus, for example, if one contributes \$25 to a synagogue, the \$25 is tax-deductible; but if one pays \$25 to a synagogue and receives in return a book worth \$25, the payment is not tax-deductible. Some payments are "dual-purpose": if one pays \$100 to a synagogue and receives a book worth \$25, \$75 is deemed a tax-deductible contribution, and \$25 is deemed a non-deductible *quid pro quo* payment.

Over the years, IRS recognized certain exceptions to the general non-deductibility of *quid pro quo* payments. For example, when one pays for High Holiday seats in a synagogue, IRS accepts that the payment is fully tax-deductible, even though the person receives a benefit in return. Similarly, pew rents, payments for dedicated Masses, and Mormon tithes are all accepted by IRS as fully deductible, notwithstanding that they are *quid pro quo* payments. Based upon this, it was understood among the lawyers, accountants, and others who focus upon such things that *quid pro quo* payments to religious organizations were tax-deductible if only intangible religious benefits were received in return.

This understanding was rejected by the Supreme Court in 1989. The Church of Scientology ("CoS") was founded by L. Ron Hubbard in the 1950s. Hundreds, if not thousands, of

lawsuits were filed by Scientologists (represented by CoS-paid lawyers) who claimed that their payments for "training" were tax-deductible. "Training" is the term used in CoS for instruction concerning its tenets.

In 1989, this question came before the Supreme Court in the case of *Hernandez v. Commissioner of Internal Revenue*. IRS argued that payments for "training" were non-deductible *quid pro quo* payments. CoS contended that its practitioners received only intangible religious benefits through training, and that it was unconstitutional for IRS to favor other religions by permitting their members to deduct payments, in exchange for which they received intangible religious benefits, while not permitting Scientologists to do so.

In a 5 to 2 decision, the Supreme Court ruled that payments for training were classic *quid pro quo* payments, and therefore were not deductible. The Court held that the phrase "intangible religious benefits" did not appear in the Internal Revenue Code, so there was no reason to treat payments in exchange for intangible religious benefits differently from other *quid pro quo* payments. The Court also noted that the legitimacy of the types of deductions to which CoS pointed - High Holiday seats, pew rents, dedicated Masses, Mormon tithes - was not before the Court, so it could not say whether it would approve such deductions, either. The two justices in the minority (O'Connor and Scalia) concluded that IRS was unconstitutionally discriminating against Scientologists.

The *Hernandez* decision was highly problematical for all religions in America, because it called into question critically important fund-

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raising methods. They, therefore, sought to have the tax law amended, to provide explicitly that payments in exchange for intangible religious benefits are tax-deductible. At the same time, IRS wanted to increase the documentation required for charitable contributions, in order to restrain taxpayers from deducting other kinds of *quid pro quo* payments.

In June 1993 Congress enacted certain amendments to the Internal Revenue Code. One makes it necessary to have a written receipt in order to deduct any payment of \$250 or more. This receipt must indicate the value of any goods or services received by the taxpayer in exchange for the payment, except that no value need be assigned to "intangible religious benefits" provided by religious organizations. Thus, this phrase entered the Internal Revenue Code, with clear indication that payments to religious organizations in exchange for intangible religious benefits are tax-deductible.

Shortly after these amendments, in October 1993, IRS and CoS entered into an agreement, which provides, among other things, that members of CoS may deduct their payments for "training" as charitable contributions. IRS has steadfastly refused, however, to permit practitioners of any other religion to deduct their payments for religious instruction.

Two taxpayers - Michael and Maria Sklar of Los Angeles (formerly of Baltimore) - have taken IRS to court over this issue. In 1994 and 1995, the Sklars deducted as charitable contributions the portions of their tuition payments attributable to *limudei kodesh* (religious studies). The Sklars contended that they and their children received intangible religious benefits from the children's *limudei kodesh*, and that it is unconstitutional for IRS to permit practitioners of one religion to deduct their payments for religious

instruction, but not to permit practitioners of other religions to do so. For each year, IRS disallowed the deduction, and the Sklars asked the Tax Court to overrule IRS.

Michael Sklar (who is a CPA, but not a lawyer) represented himself and his wife in the 1994 case. He lost in Tax Court and appealed to the United States Court of Appeals for the Ninth Circuit. I first learned of his case while the appeal was pending, and my firm and I undertook to represent the Sklars *pro bono* (for free). In February 2002, the Ninth Circuit affirmed the Tax Court, but on factual grounds, not legal grounds. It ruled that the Sklars had not shown at trial that their children's religious studies were similar to "training," or that the tuitions they paid exceeded the value of the secular education their children received. The appellate court did not rule as to whether tuition payments in excess of the value of the secular education would have been deductible, or whether IRS' behavior would be unconstitutional if "training" was similar to *limudei kodesh*.

With the 1994 case thus ended, the Tax Court took the 1995 case off a back burner. My firm and I agreed to represent the Sklars in this case, too, *pro bono*. After two-and-a-half years of pre-trial discovery and motions, last November the 1995 case went to trial in United States Tax Court in Los Angeles. At this trial, we offered evidence, including expert testimony by a former Dean of the Graduate School of Education at UCLA, concerning the value of the secular education received by the Sklars' children. We also offered evidence to show that "training" is similar to the children's religious studies (in a legal sense, not, *chas u'shalom*, in terms of content). We are now working on post-trial briefs, and anticipate a decision around Rosh Hashana, at the earliest.

Unfortunately, whether we win or lose, as long as the Sklars live in California, an appeal (by IRS or by us)

will go to the Ninth Circuit, and that is the federal appellate court that would be least receptive to our arguments. The Ninth Circuit is notorious for having an extremist, anti-religion interpretation of the First Amendment. The Ninth Circuit would almost certainly try to rule that the tax law does not permit deduction of payments in exchange for intangible religious benefits; and if it could not find a way to say this, it would almost certainly rule that the federal government may not constitutionally permit such deductions.

The Fourth Circuit - which encompasses Maryland, Virginia, West Virginia, and North and South Carolina - is at the opposite pole jurisprudentially from the Ninth Circuit. Of the 12 federal appellate courts, the Fourth Circuit would be the most receptive to our arguments.

I therefore turn to the readers of *Where What When* who reside in Maryland (or anywhere else in the Fourth Circuit): If even one of you is willing to be the test case, we would have the best possible chance of establishing the deductibility of tuition payments for religious studies. Being the test case would mean claiming a deduction on your 2004 tax return for tuition attributable to religious studies; filing a Form 8275 to flag the deduction for IRS (and protect you against being penalized for having taken it); paying the additional tax assessed by IRS after it disallows the deduction; and being the plaintiff in a lawsuit against IRS in the federal court in Baltimore, seeking a refund of the additional tax paid.

For more information, or to discuss the possibility of being a test case, please call me, Jeff Zuckerman, at 202-452-7350, or write to me at jzuckerman@cm-p.com. *

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