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September 24, 1992

DATE

MEMO To: Mr. Wyatt Moore
Presbytery of New York CityRe: Liability of individual members of the CRU
for withholding taxes of particular churches

You have asked me to address this memorandum to you because of the concern of the Corporate Responsibilities Unit members that they might be held to be collectively or individually liable for withholding taxes that member churches of the Presbytery fail to remit to the proper authorities.

The relatively recent enforcement of the notion that most people who work in churches are employees, as to whom withholding taxes must be paid, is not discriminatory by the Internal Revenue Service. The Service has concluded that by sweeping as many people as possible into the category of employees (as opposed to independent contractors), the withholding taxes, that is to say, the income and FICA taxes, will reach the government much sooner than if they wait for people who are claiming to be independent contractors to make estimated tax payments or, possibly, only a single tax payment, each year.

I have written to the Presbytery on prior occasions concerning the concept of it being difficult for a church worker in fact to be an independent contractor. The mere identification of an individual as an independent contractor does not make him or her be an independent contractor. What is determinative is the amount of control that the party paying the compensation exercises over the individual worker. The more control that the employer has, the less likely it is that the person who is doing the work is, or will be considered by the IRS to be, an independent contractor.

With respect to liability for withholding taxes, which I have also discussed from time to time in memoranda to the Presbytery and to individual churches, the rule is that the trustees or directors of an organization that has employees are personally liable for paying over taxes that are, or should be, withheld from the employees. More and more, churches which

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engage people to provide services of various kinds are finding that the IRS will say that those people are employees of the church that pays their salaries.

As noted above, the individual members of the church Board of Trustees are the ones who are personally liable for such taxes. It therefore would appear that the individual members of the CRU are without liability, if the church Trustees fail to pay over withholding taxes. However, as I cautioned you on the phone, there are situations in which, under ecclesiastical law (and also civil law; see for example, Sec. 17-b of the Religious Corporations Law), the Presbytery would become the owner of all of the assets of the church. I think that if I were the IRS I would take the position that the Presbytery cannot acquire the assets of a church without also acquiring its liabilities. It would follow that if the Presbytery became the owner of the assets of a particular church because the church property was being used contrary to the Constitution of the PCUSA (Form of Government, G-8.0300), or upon the appointment of an administrative commission (G-11.0103S), or because the church is dissolved (G-8.0400), the directors of the corporate Presbytery (the members of CRU) would become personally liable for withholding taxes unpaid by that church.

Subject to the foregoing, the CRU members, as directors of the corporate Presbytery are liable only with respect to the taxes withheld from Presbytery employees.

I hope that this memorandum serves your purposes, but if you need further explanation, please be sure to call me.



Walter J. Handelman

WJH:aj
Encl.

cc: The Rev. Spencer C. Gibbs