IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF GEORGIA

UNITED STATES OF AMERICA,)
)
v.) Case No. 1:07-CR-108
)
SHERRY PEEL JACKSON,)
)
Defendant.)

JACKSON'S REPLY TO GOVERNMENT'S RESPONSE
TO APA MOTION TO DISMISS

On June 11, 2007, Defendant Jackson submitted her motion to dismiss the Information in this case (Doc. 14), that was premised upon asserted violations of the Administrative Procedure Act ("APA"). The prosecution responded to this motion on July 2, 2007 (Doc. 24). This brief constitutes Jackson's reply to the prosecution's response.

SUMMARY OF REPLY

Jackson is charged here with violations of 26 U.S.C. §7203, which provides that "[a]ny person * * * required by this title or by regulations made under authority thereof to make a return * * * who willfully fails to * * * make such return * * * at the time or times required by law or regulations, shall" be guilty of an offense against the United States. By itself, §7203 clearly depends for its enforceability on other provisions of the Internal Revenue Code. In this case since income tax returns are at issue, those other provisions include 26 U.S.C. §6012.

A quick read of §6012 plainly shows that those required to make income tax returns are individuals having "gross income which equals or exceeds the exemption amount," which as shown by Jackson in her opening brief, ultimately descends to consideration of 26 U.S.C. §151(d) and § 1(f). The prosecution in its brief failed to show where in the law are found the specific "exemption amounts" for the years involved in this case, which is precisely the point made by Jackson. Clearly, the determination of the "exemption amount" is the fundamental basis for the duty at issue in this case: Jackson's requirement to file income tax returns.

The APA, and particularly 5 U.S.C. §551(4), defines a "rule" for APA purposes as including "the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." The method of determining the "exemption amount" ultimately falls upon the U.S. Department of Labor ("DoL") and its calculation of the consumer price index ("CPI"), which is virtually indistinguishable from "rates" and "valuations" as mentioned in §551(4). Nor is the CPI distinguishable from "cost-of-living" adjustments. In this respect, the cases of *Alaniz v. Office of Personnel Management*, 728 F.2d 1460 (Fed.Cir. 1984), and *Batterton v. Marshall*, 648 F.2d 694 (D.C.Cir. 1980), have already determined this issue in Jackson's favor. Simply stated, the CPI, which is also a "cost-of-living" adjustment,

must as stated in *Alaniz* be duly promulgated as a regulation. Since this admittedly has not been done, there is no legal and enforceable "exemption amount" as mentioned in §6012.

For reply, the prosecution raises several arguments, all without merit. It asserts (a) that cases have already held that the duty to file is determined by statutes rather than regulations; (b) that actual notice of the exemption amount in various IRS publications is sufficient; and (c) that form 1040 instruction booklets, Revenue Procedures and CPI information (posted only on the DoL's website) are sufficient to inform Jackson of the exemption amount. These arguments are addressed as follows.

I. Prior Cases.

The prosecution cites *United States v. Bowers*, 920 F.2d 220, 222 (4th Cir. 1990); *United States v. Hicks*, 947 F.2d 1356, 1360 (9th Cir. 1991); and *United States v. Neff*, 954 F.2d 698 (11th Cir. 1992), for the proposition that this issue has already been decided. The quick answer is that these cases simply could not have involved this issue and this is the reason that such issue was neither raised nor decided in these cases. Section 151(d) states that, as of 1989, the exemption amount was $2000. Via §151(d)(4), the inflation adjustment commences after 1989. *Bowers*, *Hicks* and *Neff* involved prosecutions for offenses committed in the mid-80s, before the statutory changes to §151 were made in 1990. These defendants were prosecuted for years

prior to these statutory changes and obviously, they did not challenge a statutory scheme that did not exist for those years. Thus, these cases do not address the statutory scheme relevant for this case, which clearly depends on exemption amounts determine via a procedure contrary to the APA. See *Alaniz* and *Batterton*, supra.

II. Actual Notice.

The prosecution relies on *United States v. Mowat*, 582 F.2d 1194 (9th Cir. 1978), for the proposition that actual notice of numbers appearing in IRS publications may be sufficient. The problem with this supposition is that actual notice must involve notice of an actual, legislative-type regulation. If an agency has adopted a regulation via the procedure required by law, and then gives actual notice to some party subject to the regulation, such might constitute actual notice. But actual notice of something that is not even a regulation, or even an interpretive regulation, is inadequate. See *U.S. Steel Corp. v. U.S. EPA*, 595 F.2d 207, 212-13 (5th Cir. 1979); and *Brown Express, Inc. v. United States*, 607 F.2d 695, 700-02 (5th Cir. 1979).

The cases regarding this proposition are many and mentioned in Jackson's opening brief. Legislative-type regulations must be adopted via APA procedures. Many of the cases mentioned in Jackson's opening brief involved parties having actual knowledge of these types of regulations, although these parties asserted that the legislative-type regulations at issue in those cases were void because of the APA

deficiencies. The same applies here. If the exemption amounts appearing in IRS publications are in fact legislative-type regulations, Jackson is still free to assert that they have not been adopted via the APA.

Furthermore, the prosecution still relies upon IRS publications for its arguments, but the 11th Circuit has declared several times that such publications are not law. See *CWT Farms, Inc. v. Commissioner*, 755 F.2d 790, 803 (11th Cir. 1985)(Service's informal publications are not binding authority); and *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231, 1243 fn. 11 (11th Cir. 1998) (same).

III. Other IRS Publications and DoL Information.

Perhaps the strongest part of the prosecution's argument is set forth in its footnote on page 5:

> "The defendant claims that there is no way to determine 'exemption amount,' stating that the Code of Federal Regulations leads to the "dead end" of the Bureau of Labor Statistics. To determine one's exemption amount, a taxpayer has a choice of (1) reading the Form 1040 and/or the accompanying instructions of or the pertinent tax year, both of which explicitly state the exemption amount for various filing statutes; (2) referencing the annual IRS Revenue Procedures that publicly announce the tax year's exemption amounts; or (3) going through the more complicated process, described above, of cross referencing the statutes, regulations, and the consumer price index to calculate the same number referenced in option one. Either way, the taxpayer can accurately determine the threshold filing requirement for any given tax year."

Here, the prosecution clearly relies on the calculation of the CPI by the DoL,

wherever this information may be found. It also relies on the Form 1040 instruction booklets, and IRS Revenue Procedures. None of these bases are legally sufficient, however.

While the prosecution references the DoL's calculation of the CPI, it completely fails to inform this court that such information appears only on the DoL's website, and it certainly does not appear in the Federal Register. Materials gleaned from the Internet have been found inherently untrustworthy. See *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F.Supp.2d 773, 774-775 (S.D.Tex. 1999)("While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation. So as to not mince words, the Court reiterates that this so-called Web provides no way of verifying the authenticity of the alleged contentions that Plaintiff wishes to rely upon in his Response to Defendant's Motion. There is no way Plaintiff can overcome the presumption that the information he discovered on the Internet is inherently untrustworthy. Anyone can put anything on the Internet. No web-site is monitored for accuracy and nothing contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content on any web-site from any location at any time. For these reasons, any evidence procured off the Internet is adequate for almost nothing, even under the most liberal

interpretation of the hearsay exception rules found in Fed.R.Civ.P. 807 [sic]"); *United States v. Jackson*, 208 F.3d 633, 637 (7th Cir. 2000) ("'evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretations of the hearsay exception rules'", quoting *St. Clair*, supra); *Barbour v. Head*, 178 F.Supp.2d 758, 760 n. 3 (S.D. Tex. 2001) ("information obtained from the Internet is 'inherently untrustworthy'"); *Fenner v. Suthers*, 194 F.Supp.2d 1146, 1149 (D.Colo. 2002); *Tolliver v. Federal Republic of Nigeria*, 265 F.Supp.2d 873, 876 (W.D.Mich. 2003)("Plaintiffs have also offered a number of 'internet' documents as exhibits. The documents are simply news postings on the internet. Those documents are rife with hearsay and were not properly authenticated by persons with personal knowledge. Therefore, those documents will be stricken since they do not constitute proper evidence under Rule 56(e)"); and *In re Block*, 727 N.W.2d 166, 177 (Minn.App. 2007). The prosecution fails to explain in its brief how the CPI data it references can be classified as Rule 803 "business records", or even matters of which this court can take judicial notice.

The prosecution also alleges that IRS Revenue Procedures can be used to provide or calculate the exemption amount. But, neither Revenue Rulings or Revenue Procedures are law since they have not been promulgated as regulations and published in the Federal Register pursuant to the commands of the APA. See *United States v. Bennett*, 186 F.2d 407, 410 (5th Cir. 1951)(such have "no more [ ] legal

force than the opinion of any other lawyer"); *Stubbs, Overbeck & Assoc. v. United States*, 445 F.2d 1142, 1146-47 (5th Cir. 1971)("The government argues that Revenue Ruling 59-371, 1959-2 Cum.Bull. 236, has the force and effect of law. We do not agree. A ruling is merely the opinion of a lawyer in the agency and must be accepted as such"); *Idaho Power Company v. C. I. R.*, 477 F.2d 688, 696 fn. 10 (9th Cir. 1973)("A revenue ruling, as distinguished from a regulation or a Treasury decision, does not have the force and effect of law. It is merely the opinion of a lawyer in an agency"); *Xerox Corp. v United States*, 41 F.3d 647, 657 (Fed.Cir. 1994)("Revenue Procedures 'do not have the force and effect of Treasury Department Regulations.' 1980-1 C.B. at v. See *Helvering v. New York Trust Co.*, 292 U.S. 455, 468, 54 S.Ct. 806, 810, 78 L.Ed. 1361 (1934) (revenue rulings cited by the Commissioner 'have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of law')"); and *Compaq Computer Corp. v. Commissioner*, 113 T.C. 363, 372 (1999) ("it is well established that a revenue procedure is not a law binding upon the Court but is merely a statement of the Commissioner's position", citing *Xerox, supra,* and *Casanova Co. v. Commissioner*, 87 T.C. 214, 223 (1986)). And certainly the prosecution is not asserting here that materials published in the Cumulative Bulletin or IRS news releases are "law." See *National Family Planning v. Sullivan*, 979 F.2d 227, 229 (D.C.Cir. 1992)(agency announcement was not law); *Alaska Professional Hunters Assn. v. F.A.A.*, 177 F.3d 1030, 1036 (D.C.Cir. 1999)("The Notice to Operators was

published without notice and comment and it is therefore invalid"); *Sloan v. Dep't. Of Housing & Urban Dev.*, 231 F.3d 10, 18 (D.C.Cir. 2000); and *Kugel v. United States*, 947 F.2d 1504, 1507-08 (D.C.Cir. 1991).

As predicted by Jackson in her opening brief, the prosecution relies to a great extent on the Form 1040 instruction booklets as providing the "exemption amount" for the years covered by the Information. Ninth Circuit[1] authority is quite clear that agency publications that are not formally adopted as rules have no legal force and effect. For example, the case *Hi-Ridge Lumber Co. v. United States*, 443 F.2d 452, 455 (9th Cir. 1971), involved a lawsuit over the auction of Forest Service owned land. One party relied on a manual to buttress his claim arising from that sale, but the court simply stated that the manual "does not rise to the status of a regulation." In *Anderson v. Butz*, 550 F.2d 459 (9th Cir. 1977), a Food Stamp Certification Handbook commanded that HUD rent subsidies should be considered as "income" for food stamp purposes. Finding a substantial impact upon recipients of food stamps as a consequence of this "rule" contained in these unpublished instructions, the court declared the same void and unenforceable. See also *Rifai v. United States Parole Commission*, 586 F.2d 695, 698 fn. 5 (9th Cir. 1978)(parole guidelines do not have the force and effect of law); and *Buschmann v. Schweiker*, 676 F.2d 352 (9th Cir. 1982).

[1] In her opening brief, Jackson presented a complete circuit-by-circuit survey of the relevant decisional authorities regarding this issue. She now simply uses the above Ninth Circuit authority for illustration purposes.

In *Angle v. United States*, 709 F.2d 570, 577 (9th Cir. 1983), claimants to a judgment against the United States were required to submit claims prior to a deadline established by published regulations. A deadline extension was held void because not duly promulgated and published as required by the APA. The case of *W.C. v. Bowen*, 807 F.2d 1502, 1504 (9th Cir. 1987), involved a class of social security claimants who were denied disability benefits. The "Bellmon Review Program" that reviewed ALJ decisions of such claims was established without duly promulgated regulations and was found void. See also *Coleman v. Perrill*, 845 F.2d 876, 879 (9th Cir. 1988), regarding a Parole Commission manual held to be "merely precatory".

In *Jacobo v. United States*, 853 F.2d 640, 641 (9th Cir. 1988), Jacobo attempted to use a Navy Ships Technical Manual to establish duties owed to him by the United States arising from a personal injury. The court concluded that the Navy's internal manual "is not a regulation and does not have the force of law." In *Southern California Aerial Advertisers' Ass'n v. F.A.A.*, 881 F.2d 672, 677 (9th Cir. 1989), the FAA prohibited by means of a letter flights near LAX by banner-towing aircraft. That "Holweger letter" was held to be without force and effect. In *San Diego Air Sports Cntr., Inc. v. F.A.A.*, 887 F.2d 966, 971 (9th Cir. 1989), a FAA ban on parachuting imposed via another letter was held void as violative of the APA. In *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992), a change in voting procedures involving a marketing order affecting producers of Valencia oranges that occurred without

formal APA processes was held void. In *Yesler Terrace Community v. Cisneros*, 37 F.3d 442 (9th Cir. 1994), HUD's approval of Washington's state eviction procedures without formal promulgation of a regulation was voided. See also *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1168 (9th Cir. 2000)("the Engineering Regulation is not binding on the Corps because it is a general policy statement rather than a substantive rule"); *Moore v. Apfel*, 216 F.3d 864, 868 (9th Cir. 2000)(SSA Hallex manual had no force and effect as law); *Lowry v. Barnhart*, 329 F.3d 1019, 1022 (9th Cir. 2003); and *Paulsen v. Daniels*, 413 F.3d 999, 1005-06 (9th Cir. 2005).

Precisely how do numbers that might appear in the Form 1040 instruction booklets differ from a Forest Service manual, the Food Stamp Certification Handbook, parole guidelines, the "Bellmon Review Program", a Parole Commission manual, a Navy Ships Technical Manual, the "Holweger letter", an Engineering Regulation, and the SSA Hallex manual, among others? "To have the force and effect of law, enforceable [by or] against an agency in federal court, the agency pronouncement must (1) prescribe substantive rules — not interpretive rules, general statements of policy or rules of agency organization, procedure or practice — and, (2) conform to certain procedural requirements. To satisfy the first requirement the rule must be legislative in nature, affecting individual rights and obligations; to satisfy the second, it must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural

requirements imposed by Congress." See *James v. United States Parole Comm'n*, 159 F.3d 1200, 1205-06 (9th Cir. 1998). Simply put, the numbers that might appear in the Form 1040 instruction booklets are not law because the same have not been duly promulgated via the APA. And this same rationale applies to CPI data that might appear on the DoL's website.

According to the prosecution, the DoL's website data is used to calculate a wide variety of inflation adjustments for a number of federal agencies, including the IRS. If true, that data and the resulting CPI must be promulgated as regulations via the APA to accord to that data and the resulting CPI the force and effect of law. In *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 621 (5th Cir. 1994), the Minerals Management Service devised a "Procedure Paper" that was used to calculate royalty payments. Obviously, a number was calculated by means of the Procedure Paper and that number was utilized to determine royalty payments. That court found that this "change in valuation technique dramatically affects the royalty values of all oil and gas leases. Thus, the Procedure Paper should have been published in the Federal Register and offered for notice and comment. A party may not be adversely affected by a rule promulgated in violation of these requirements." See also *Texaco, Inc. v. F.P.C.*, 412 F.2d 740 (3rd Cir. 1969), involving an unpublished regulation providing the method for the calculation of interest; *Pickus v. United States Bd. of Parole*, 507 F.2d 1107, 1113 (D.C.Cir. 1974); and *Dalton v. United States*, 816 F.2d 971,

974 (4th Cir. 1987). The calculation of annual changes in the CPI is legally no different from a method used to calculate royalty payments, and since the CPI obviously affects the public, it is required to be promulgated as a regulation. See *Maximum Home Health Care, Inc. v. Shalala*, 272 F.3d 318, 321-22 (6th Cir. 2001).

As the prosecution notes in its brief, apparently the DoL calculates the CPI which is then used to determine the exemption amount for purposes of both 26 U.S.C. §§151 and 6012. This is a mathematical computation, the results of which impose duties on the public. As the court noted in *Hoctor v. U.S. Department of Agriculture*, 82 F.3d 165, 169 (7th Cir. 1996), a rule having a numerical component is typically a legislative-type rule, and is invalid if not adopted via the APA. The courts in *Alaniz v. Office of Personnel Management*, 728 F.2d 1460, 1467 (Fed.Cir. 1984), which concerned "cost-of-living adjustments" for federal employees, and *Batterton v. Marshall*, 648 F.2d 694 (D.C.Cir. 1980), which involved the calculation of unemployment statistics by the DoL, have similarly held that the mathematical computations in those cases constituted rules.[2] The same conclusion is required here.

[2] For similar State cases, see *Florida State University v. Dann*, 400 So.2d 1304, 1305 (Fla.App. 1981)(salary document setting forth the manner for granting merit salaries to university employees was held to be a void rule); *Northwest Airlines, Inc. v. State Tax Appeal Board*, 720 P.2d 676, 678 (Mont. 1986)(tax apportionment formula devised by state tax authorities to compute the amount of taxes owed was held void); *Grier v. Kizer*, 268 Cal.Rptr. 244 (Cal.App. 1990)(statistical auditing technique was held void); and *Bruns v. Kansas State Board of Technical Professions*, 255 P. 728, 877 P.2d 391 (1994)(unpublished standard was void).

The prosecution also asserts that the CPI is simply "incorporated by reference" into 26 U.S.C. §§151 and 6012, and it relies upon *United States v. Iverson*, 162 F.3d 1015, 1019 (9th Cir. 1998), for the idea that such is valid. However, *Iverson* is completely distinguishable because the federal law involved in that case, the Clean Water Act, expressly incorporated state and local law into its provisions: "the CWA allows states to administer water pretreatment programs. 33 U.S.C. § 1342(b). If the Environmental Protection Agency (EPA) approves a state's regulations, violations of those regulations are treated as federal criminal offenses." That which was incorporated by reference in *Iverson* actually was law. Here, that which the prosecution wishes to incorporate by reference is not law, but mere words and numbers appearing in Form 1040 instruction booklets or on the Internet. There already exists a process for incorporation by reference, but it has not been followed in this instance. See *PPG Industries, Inc. v. Costle*, 659 F.2d 1239, 1250 (D.C.Cir. 1981)("If a required definition or procedure is part of a rule, it must be published or incorporated by reference in the Federal Register, 5 U.S.C. § 552(a)(1)(D) (1976)"); and *Appalachian Power Company v. Train*, 566 F.2d 451, 455 (4th Cir. 1977)("[T]he Development Document is not a validly issued part of the regulations, because it has not been published in the Federal Register, nor have the procedural requisites for incorporation by reference been complied with").

Finally, based on its *Booker* argument, the prosecution contends that the

solution to this problem that Jackson raises is to simply "excise" from the existing tax law certain provisions thereof. But, this is no remedy at all. In *Booker*, a constitutional challenge was made to the mandatory nature of the federal sentencing guidelines, and the Supreme Court declared that certain provisions of the criminal code were unconstitutional, thus mandating excision of the unconstitutional parts. Here, however, neither Jackson nor the prosecution contends that the provisions of the I.R. Code creating this problem are unconstitutional. This court, lacking legislative powers, cannot thus "excise" these parts of the law.

CONCLUSION

For the reasons noted herein, Jackson's motion to dismiss is due to be granted.

Respectfully submitted this the 16th day of July, 2007.

/s/ *Lowell H. Becraft, Jr.*

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing REPLY was formatted in Book Antigua 13 pt., in accordance with Local Rule 5.1B, and was electronically filed this day with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following Assistant United States Attorney of record:

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Dated: This 16th day of July, 2007.

/s/ *Lowell H. Becraft, Jr.*
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