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OCT 25 2004

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN THOMAS HARPOLE,

Defendant.

Case No. A04-0025 CR (JKS)

ORDER

Defendant John Thomas Harpole was charged in a twelve count indictment with various tax related offenses. *See* Docket No. 1. A jury trial was held on June 21–25, 2004. The jury returned guilty verdicts on all counts. *See* Docket No. 76. During the trial, Harpole asked for a judgment of acquittal pursuant to Criminal Rule 29 as to counts one through six, which charged him with attempted tax evasion. The Court deferred ruling on Harpole's motion pending briefing by the parties. The parties have filed their briefs, and the motion is therefore ripe for a ruling. *See* Docket Nos. 73 (Def. brief); 80 (Govt. opp'n); 81 (Def. reply).

Harpole's argument relates to a United States Treasury publication, Circular E. Section 3402 regulates the withholding requirements of the Internal Revenue Code. That section dictates that employers must deduct and withhold wages from employees' salaries "in accordance with tables or computational procedures prescribed by the Secretary." 26 U.S.C. § 3402(a)(1). According to Harpole, the current regulations implementing the procedures described by § 3402 are 26 C.F.R. §§ 31.3402(b)-1 and 31.3402(c)-1. Docket No. 73 at 2. Both of these sections refer to Circular E, which is referred to in the regulations as the "Employer's Tax Guide" and which outlines

tax withholding tables employers can use in calculating the appropriate amount to withhold as taxes from employee wages.

Harpole finds fault in the above procedures because he claims that Circular E has never been adopted as a regulation pursuant to the requirements of the Administrative Procedures Act ("APA"). *Id.* at 3–4; see generally 5 U.S.C. § 553. In other words, because Circular E never followed the notice and comment requirements of the APA, its mandates are not enforceable against Harpole in this proceeding. He likens the consequences of the Government's failure to follow the APA's procedures to other regulations that a variety of courts have held to be unenforceable because of the applicable agency's failure to follow the appropriate APA procedures. See *id.* at 4–5. In succession he points to regulations banning commercial fishing, regulatory provisions of the Clean Air Act, standards for effluent emissions, and a provision of the food stamp program. *Id.* at 4–5. Each of these "regulations" were held to be unenforceable because they were not promulgated pursuant to applicable APA procedures. So too, Harpole reasons, must Circular E be unenforceable, with the legal impact being that he could not have been subject to any wage withholding under its requirements. Thus, he could not have evaded a regulation that he had no legal duty to follow.

Even assuming all of the above to be true, Harpole's argument is simply meritless. It mistakes the proverbial trees for the forest. Harpole was charged in counts one through six with violating 26 U.S.C. § 7201. Section 7201 provides: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony" "To establish a violation of § 7201, the government must prove willfulness, the existence of a tax deficiency and an affirmative act constituting an evasion or attempted evasion of tax." *United States v. Copeland*, 786 F.2d 768, 770 (7th Cir. 1985). As the Government notes, evasion can be evinced by a variety of acts, even if those acts would otherwise be legal, so long as the defendant performs those acts with an intent to evade paying taxes. See Docket No. 80 at 3. One of the acts through which a jury can infer intent to evade paying tax is the filing of a false W-4 form, even if that filing, standing alone, would only constitute a misdemeanor. *Copeland*, 786 F.2d at 770–71. In this case, there was more than sufficient evidence that Harpole filed a false W-4. Indeed, he does not argue that he never filed a W-4 that

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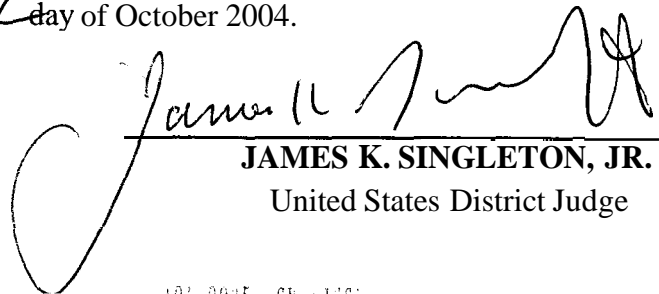
falsely claimed he was exempt from withholding; evidence of which the Government produced at trial. Instead, his argument turns logic on its head in contending that because he was under no legal duty, due to the deficiencies in the aforementioned Circular E, to comply with the withholding statutes, he then was entitled to file a false W-4. The simple restating of this argument should suffice to outline its merits. In the event it does not, Ninth Circuit precedent adequately addresses them. See, *e.g.*, *United States v. Hicks*, 947 F.2d 1356, 1360 (9th Cir.1991).

Perhaps more important, however, courts have considered similar arguments and rejected them. A number of cases have considered challenges to IRS forms that were allegedly defective because they were not adopted according to APA procedures. They are remarkable for the simple fact that they each reject this contention. See, *e.g.*, *Hicks*, 947 F.2d at 1360 (holding that any failure of IRS to promulgate Form 1040 according to APA procedures did not excuse the defendant's duty to file tax returns nor his liability for failure to do so); *United States v. Bentson*, 947 F.2d 1353, 1355-56 (9th Cir. 1991) (same); *United States v. Bowers*, 920 F.2d 220, 221-23 (4th Cir. 1990) (holding that IRS's alleged failure to comply with tax form publication requirements did not preclude defendants' convictions for income tax evasion). "It is the tax code itself, without reference to regulations, that imposes the duty to file a tax return." *Hicks*, 947 F.2d at 1360. There was ample evidence adduced at trial that Harpole did not comply with this duty. Accordingly, his motion for judgment of acquittal will be denied.

IT IS THEREFORE ORDERED:

Defendant's motion for judgment of acquittal is **DENIED**.

Dated at Anchorage, Alaska, this 22 day of October 2004.



JAMES K. SINGLETON, JR.
United States District Judge

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ORDER