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Lance Wells  
Attorney for Harpole  
733 West 4<sup>th</sup> Avenue, St. 308  
Anchorage, Alaska 99501  
907-274-9696

Lowell H. Becraft, Jr.  
Attorney for Harpole  
209 Lincoln Street  
Huntsville, AL 35801  
256-533-2535

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

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CASE NO. A04-025 CR (JKS)
	)	
JOHN THOMAS HARPOLE,	)	
	)	
Defendant.	)	

**DEFENDANT'S REPLY TO GOVERNMENT'S BRIEF  
REGARDING HARPOLE'S RULE 29 MOTION**

Comes now the Defendant, John Thomas Harpole, through his undersigned attorneys, and does hereby submit the following reply brief in response to the prosecution's brief submitted herein on July 1, 2004 regarding Harpole's motion for judgment of acquittal.

I. Standard for Vacation of Convictions.

At the conclusion of the government's proof and again at the conclusion of all the evidence offered at trial, Harpole moved via Rule 29, F.R.Cr.P., for judgment of acquittal

regarding the tax evasion counts in the indictment on the grounds that Circular E, a document mentioned in 26 C.F.R. §§31.3402(b)-1 and (c)-1, was not a duly promulgated regulation. In its brief, the prosecution contends that the non-publication of Circular E is meaningless here because the submission of a withholding exemption certificate is a matter governed by law rather than regulation; accordingly, the prosecution argues the failure to promulgate this document as a regulation is without effect in this case. However, the prosecution misconceives the thrust of Harpole's argument. For vacation of Harpole's conviction on the evasion counts of the indictment, he needs to only demonstrate that one of the legal theories that was submitted to the jury was legally erroneous.

General verdicts in criminal cases may be set aside if the basis therefor is premised upon some constitutional or statutory violation. For example, in *Stromberg v. California*, 283 U.S. 359, 368, 51 S.Ct. 532 (1931), the defendant had been convicted of violating a state law against sedition, one clause of which simply proscribed the display of a red flag "as a sign, symbol or emblem of opposition to organized government". Here, the court concluded that this part of the state law was unconstitutional, and yet it was also possible that the jury convicted the defendant for violating that part of the law. In vacating Stromberg's conviction, the court held that "if any of the clauses [of the California sedition law] is invalid under the Federal Constitution, the conviction cannot be upheld."

Similarly, convictions based not upon a constitutional but a statutory violation

must also be vacated. In *Yates v. United States*, 354 U.S. 298, 312, 77 S.Ct. 1064 (1957), a number of Communist Party members were prosecuted and convicted for conspiring to overthrow of the Government of the United States by force and violence. However, a number of the overt acts in the conspiracy count were beyond the statute of limitations, yet those overt acts may have been the basis for the convictions in question. In vacating some of the convictions in this case, the Court declared:

"In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not another, and it is impossible to tell which ground the jury selected."

See also *Griffin v. United States*, 502 U.S. 46, 51-52, 112 S.Ct. 466 (1991); and *United States v. Nieves-Burgos*, 62 F.3d 431,435-36 (1<sup>st</sup> Cir. 1995).

This circuit follows these rules established via the above cases. In *Keating v. Hood*, 191 F.3d 1053, 1062 (9<sup>th</sup> Cir. 1999), that court noted as follows:

"We have consistently interpreted Supreme Court precedent to require reversal in any case in which a verdict may have rested on a legally invalid ground."

See also *United States v. Fuchs*, 218 F.3d 957, 962 (9<sup>th</sup> Cir. 2000)("The Supreme Court has held that when a general verdict may be based on a legally inadequate ground, such as because of a statutory time bar, the verdict should be set aside<sup>7</sup>"); and *United States v. Sawyer*, 85 F.3d 713, 730-31 (1<sup>st</sup> Cir. 1996)("When a jury has been presented with several bases for conviction, one of which is legally erroneous, and it is impossible to tell which ground the jury convicted upon, the conviction cannot stand").

In this case, Harpole avers that 26 C.F.R. §§ 31.3402(b)-1 and (c)-1 constitute grounds upon which the tax evasion convictions in this case are based. However, since these regulations lack the force of law, convictions based on these regulations must be vacated.

## II. The Legal Inadequacy of 26 C.F.R. §§ 31.3402(b)-1 and (c)-1.

Withholding of federal income tax from wages constitutes a credit against any tax liability via 26 U.S.C. §31(a). The mechanism for such withholding is governed by chapter 24 of the Internal Revenue Code. Section 3402 requires that "every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables or computational procedures prescribed by the Secretary." To implement this legal mandate, it is essential that the Secretary prescribed enforceable regulations, which here are "tables or computational procedures." It is Hornbook administrative law known to all that regulations must be duly promulgated.

What would be the legal effect of such regulations ("tables or computational procedures") if they were not subjected to public comment **as** required by the Administrative Procedures Act? Such regulations would be "interpretive rules," described in *Drake v. Honeywell, Inc.*, 797 F.2d 603,607 (8<sup>th</sup> Cir. 1986), **as** follows:

“[W]hile an administrative agency delegated legislative power may sue to enforce its legislative rule, just **as** it may sue to enforce a statute, it cannot ground legal action in a violation of its interpretive rule ... An action based on a violation of an interpretive rule does not state a legal claim. Being in nature hortatory, rather than mandatory, interpretive rules can never be violated.”

See also U.S. *Dep't. of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1152 (5<sup>th</sup> Cir. 1984) ("nonlegislative rules do not have the force of law"); *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1168 (9<sup>th</sup> Cir. 2000)(interpretive rules do not have force of law); *United States v. American Production Industries, Inc.*, 58 F.3d 404, 407 ( 9 Cir. 1995)(interpretive rules do not create enforceable rights); *University Health Services, Inc. v. Health & Human Services*, 120 F.3d 1145, 1148 (11<sup>th</sup> Cir. 1997); and *Fed. Labor Relations Authority v. U.S. Dep't. of Navy*, 966 F.2d 747, 763 (3<sup>rd</sup> Cir. 1992).

Here, while Circular E is not a part of this record, it can be fairly surmised that such is a manual containing withholding rates for employees. But, a number of courts have concluded that such manuals have no legal force and effect. In *Western Radio Servs. Co. v. Espy*, 79 F.3d 896,901 (9<sup>th</sup> Cir. 1996), the court of appeals held:


"The Manual and Handbook are not promulgated in accordance with the procedural requirements of the Administrative Procedure Act. Neither is published in the Federal Register or the Code of Federal Regulations. See *Parker v. United States*, 448 F.2d 793, 797 (10<sup>th</sup> Cir. 1971), cert. denied, 405 U.S. 989 (1972). They are not subjected to notice and comment rulemaking; they are not regulations. *Hi-Ridge Lumber Co. v. United States*, 443 F.2d 452, 455 (9<sup>th</sup> Cir. 1971) (Manual 'does not rise to the status of a regulation')."


See also *Stone Forest Industries v. United States*, 973 F.2d 1548, 1551 (Fed. Cir. 1992) (manual does not have force and effect of law); and *Lumber, Prod. and Indus. Workers Log Scalers Local 2058 v. United States*, 580 F. Supp. 279,283 (D. Or. 1984) (manual is "basically a large compilation of guidelines .. [and] not a 'substantive' rule").

In this case involving Harpole, a major part of the prosecution's legal theory that

he committed tax evasion is predicated upon 26 C.F.R. §§ 31.3402(b)-1 and (c)-1. Clearly, the prosecution contends that Harpole was required to submit to withholding and certain amounts should have been withheld from his wages during the years at issue. That withholding process unquestionably involves §§31.3402(b)-1 and (c)-1, and these regulations are the legal foundation for the tax evasion convictions herein. Since, in the words of the Keating court, the evasion convictions "may have rested on a legally invalid ground", the same must be vacated.

Respectfully submitted this the 9 day of July, 2004.

  
Lance Wells  
Attorney for Harpole

  
Lowell H. Becraft, Jr.  
Attorney for Harpole

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the forgoing upon the below named counsel for the United States by depositing the same in the United States mail, postage prepaid, in an envelope addressed to him at his correct mailing address:

Thomas Bradley  
U.S. Attorney's Office  
Federal Building and U.S. Courthouse  
222 West 7<sup>th</sup> Avenue, #9, Room 253  
Anchorage, Alaska 99513-7567

Dated this the 9th day of July, 2004.



Lance Wells