

Case No. 07-50002

*IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES THOMAS CLAYTON,

Appellant.

ON APPEAL FROM JUDGMENTS OF CONVICTION
BEFORE THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
HON. SAM SPARKS, DISTRICT JUDGE PRESIDING

REPLY BRIEF OF APPELLANT CLAYTON
ORAL ARGUMENT REQUESTED

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(26 U.S.C. §§6012, 151 and 1)

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ARGUMENT IN REPLY

ISSUE 1: Did the district court err in denying Clayton’s motion to dismiss based on the argument that the minimum threshold filing requirement amount, the “exemption amount,” does not appear in the law?

The duty of an individual to make a federal income tax return is governed by 26 U.S.C. §6012,¹ which provides as follows: “Returns with respect to income taxes under subtitle A shall be made by the following: (1)(A) Every individual having for the taxable year gross income which equals or exceeds the exemption amount, * * *.” This section does not define the term “exemption amount,” but instead references another section of the I.R. Code: “(a)(1)(D)(ii). The term ‘exemption amount’ has the meaning given such term by section 151(d).”

Reviewing the relevant §151(d)(4) discloses the following:

“(4) Inflation adjustments.

“(A) Adjustment to basic amount of exemption.

“In the case of any taxable year beginning in a calendar year after 1989, the dollar amount contained in paragraph (1) shall be increased by an amount equal to –

“(i) such dollar amount, multiplied by

“(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, by substituting ‘calendar year 1988’ for ‘calendar year 1992’ in subparagraph (B) thereof.”

Section 151(d)(4) in turn depends on 26 U.S.C. §1(f)(3), which provides as

¹ These sections, 6012, 151 and 1, are re-produced in the addendum to this brief.

follows regarding calculation of the “cost-of-living adjustment”:

“(3) Cost-of-living adjustment.

“For purposes of paragraph (2), the cost-of-living adjustment for any calendar year is the percentage (if any) by which –

“(A) the CPI for the preceding calendar year, exceeds

“(B) the CPI for the calendar year 1992.

“(4) CPI for any calendar year.

“For purposes of paragraph (3), the CPI for any calendar year is the average of the Consumer Price Index as of the close of the 12-month period ending on August 31 of such calendar year.

“(5) Consumer Price Index.

“For purposes of paragraph (4), the term ‘Consumer Price Index’ means the last Consumer Price Index for all-urban consumers published by the Department of Labor. For purposes of the preceding sentence, the revision of the Consumer Price Index which is most consistent with the Consumer Price Index for calendar year 1986 shall be used.”

In essence, to determine the “exemption amount” mentioned in §6012, the Department of Labor (“DoL”) calculates the Consumer Price Index (“CPI”) via an obviously complex formula, and the CPI is then multiplied by the sum of \$2000 to arrive at an amount called the “exemption amount” for any given year.

The DoL’s act of calculating the CPI clearly affects the public, particularly in reference to the income tax for individuals. It is this number that, after the mathematical process of multiplication, determines the minimum filing requirement amounts. This number thus clearly implements the law regarding the making of tax returns, and is, in APA terms, a legislative-type rule. However, the CPI is simply not promulgated by the DoL via the APA and thus it lacks the force and effect of law.

It must be noted that some provisions of 26 U.S.C. §1 already delegate rulemaking authority to the Secretary of the Treasury. For example, §1(g)(7)(C) provides: “Regulations. The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this paragraph.” To give the force and effect of law to the calculation of the CPI by DoL, a new sub-section could be added (for example, 26 U.S.C. §1(f)(6)) that provides: “Regulations. The DoL Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this paragraph.” This would then subject determination of the CPI to the familiar APA rule promulgation process. However presently, Congress has omitted from the tax code any such provision for lawfully calculating the CPI. Consequently, the DoL’s CPI calculation is merely a political (as opposed to a legal) number that it produces, and any statement by the Treasury Secretary based thereon regarding what is the “exemption amount” for any particular year also lacks the force and effect of law.

This problem regarding the exemption amount was raised in one of the pre-trial motions Clayton filed in the district court. In his motion to dismiss counts 3 through 8 of the indictment (Doc. 16),² Clayton asserted that the exemption amount which

² In this brief, “Doc.” refers to the Docket Number of the indicated pleading as it appears on the district court’s docket sheet.

“triggers” the duty to make federal income tax returns does not appear in any section of the Internal Revenue Code or relevant tax regulations, and the absence of this important number from the law negated one of the elements of the crime for which he had been charged. Failure of an indictment to charge all essential elements of an offense requires its dismissal. See *United States v. Lopez*, 2 F.3d 1342, 1368 (5th Cir. 1993)(“An indictment that fails to allege * * * a necessary element of the offense[] is defective”).

In reply, the prosecution asserted that the motion lacked merit (Doc. 25). Its position regarding this issue manifested itself in footnote 2, page 3, of its brief: “To determine one’s exemption amount, a taxpayer has the choice of (1) reading the Form 1040 and/or the accompanying instructions for the pertinent tax year, both of which explicitly state the exemption amount for various filing statuses, or (2) going through the more complicated process of cross referencing the statutes, regulations, and the consumer price index to calculate the same number referenced in option one. * * *” Remarkably, however, the prosecution failed to demonstrate or prove that the “exemption amount” was in fact set forth in the Form 1040 instruction booklets by at least tendering the same as exhibits³ to such brief. Furthermore, it did not submit to

³See F.R.Evi. 902(5) for admissibility of such “pamphlets, or other publications purporting to be issued by public authority.”

the district court any data or information regarding the CPI obtained from the DoL's website. Thus, the prosecution offered no factual proof to support the position it asserted in the trial court. In short, the Form 1040 instruction booklets are not in this record on appeal, nor is any data or evidence gleaned from the DoL's website, whether concerning the CPI or otherwise.

In this appeal, Clayton has argued that the "exemption amount" as mentioned in 26 U.S.C. §§ 151 and 6012 appears nowhere in the law. In his opening brief, Clayton addressed one part of the prosecution's argument made in the district court: the exemption amount may be found in the Form 1040 instruction booklets and those amounts published therein consequently are the "law." Clearly, the Government's argument made to the district court that it can rely upon the "exemption amount" as published in the Form 1040 instruction booklets is without merit because of the wealth of decisional authorities, in this and other circuits, that rejects this argument.

Now in this appeal, the Government appears to have completely abandoned its argument based on the Form 1040 instruction booklets and finds refuge in its "fallback" position: the "exemption amount" may be calculated from CPI information posted on the DoL's Internet website. But the immediate problem for making this argument is obvious: where in this record is that data or information found? This record contains no such evidence, and trial counsel for the Government simply did not

offer such proof to the trial court. Instead, such “evidence” now appears for the first time in the Government’s brief on appeal. Unfortunately, statements in briefs filed by lawyers are not evidence. See *Skyline Corp. v. N.L.R.B.*, 613 F.2d 1328, 1337 (5th Cir. 1980)(“Statements by counsel in briefs are not evidence”); *Duha v. Agrium, Inc.*, 448 F.3d 867, 879 (6th Cir. 2006)(“Arguments in parties' briefs are not evidence”); and *British Airways Board v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978)(“But legal memoranda and oral argument are not evidence”).

Moreover, the “data” set forth in the Government’s brief regarding the CPI is allegedly obtained from the DoL’s website, which presents another substantive problem. 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 Government fails to explain in its brief how the “data” set forth therein concerning the calculation of the CPI can be classified as Rule 803 “business records”, or even matters of which this court can take judicial notice.

Before addressing the merits of the Government’s use of CPI data allegedly derived from the DoL’s website, a related matter must first be addressed. The Government in its brief (p. 15, fn. 8), relies to a degree upon certain IRS Revenue Procedures that are cited in that footnote. However, 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 Government is not asserting in this appeal 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 shown in Clayton’s opening brief, Congress for many years expressly set forth in the law the minimum filing requirement amounts, which started gradually disappearing in the 80s and were eliminated by 1990. During the time periods covered by counts 3 through 8 of the Clayton indictment, nothing in the Internal Revenue Code or the relevant tax regulations established the “exemption amount” that is the very “heart” of the requirement to make income tax returns. In his opening brief, Clayton conclusively demonstrated that the exemption amount cannot be supplied via the Form 1040 instruction booklets. For the very same reasons, the CPI data allegedly

posted on the DoL's website cannot be considered as legally determining the exemption amount: the process of calculating the CPI is clearly rulemaking subject to the dictates of the APA, which simply have not been followed here.

Ninth Circuit⁴ authority is quite clear that agency publications (such as Internet websites) 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).

⁴ In his opening brief, Clayton presented a complete circuit-by-circuit survey of the relevant decisional authorities regarding this issue. Because of page limitations for this reply brief, that cannot be presented now, and Clayton 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 does the data allegedly appearing on the DoL’s website and allegedly reproduced on page 12 of the Government’s brief legally 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 materials the Government claims are posted on the DoL’s website are not law because the same have not been duly promulgated via the APA.

According to the Government, the DoL’s website data is used to calculate a wide variety of inflation adjustments for a number of federal agencies, including the IRS (brief, at p. 17, fn. 10). If true, that data and the resulting CPI must be promulgated as regulations via the APA to accord to that data and the CPI the force and effect of law. In fact, authority in this circuit demands it. 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. This 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 Government 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.⁵ The same conclusion is required here.

The Government also asserts (br. at p. 18) 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 Government wishes to incorporate by reference is not law, but mere words and numbers appearing 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

⁵ 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).

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 (br. at p. 19), the Government contends that the solution to this problem Clayton 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 Clayton nor the Government 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.

In summary, Congress knows very well how to solve this problem that may very well be some sort of oversight. In certain parts of the I.R. Code like §1(g)(7)(C), it grants rulemaking authority to the Secretary. Here, it could simply add a similar provision to §6012 allowing the Secretary to adopt and publish pursuant to the APA

exemption amounts via some formula he determines. Better yet, it could add a similar provision to §1 and allow (or more appropriately require) the DoL to engage in rulemaking for calculation of the CPI. This would permit the public (and economists) to participate in the determination of the legal (as oppose to the present “political”) CPI. But until these changes are made, there is no legal “exemption amount” and Clayton’s motion to dismiss should have been granted.

ISSUE 2: Did the district court err in failing to give Clayton’s requested jury instructions numbered 24 and 45?

In *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370, 52 S.Ct. 183 (1932), it was held that a party could rely upon the representations made by a government agency, and in *Moser v. United States*, 341 U.S. 41, 71 S.Ct. 553 (1951), the Court held that such reliance could constitute a defense to actions taken by the government. These decisions are buttressed by others such as *Raley v. Ohio*, 360 U.S. 423, 79 S.Ct. 1257 (1959), *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476 (1965), *United States v. Laub*, 385 U.S. 475, 487, 87 S.Ct. 574 (1967), and *United States v. Penn. Industrial Chemical Corp.*, 411 U.S. 655, 674, 93 S.Ct. 1804, 1816 (1973). In *Penn. Industrial*, supra, a company being criminally prosecuted for water pollution sought to assert a defense of reliance upon certain applicable agency regulations, but the trial court precluded the admission of such evidence. In reversing, the Supreme

Court held that this reliance did constitute a defense and that the agency representations, the subject regulations, should be given as instructions.⁶

Certain tax regulations upon which Clayton relied were:

Title 26, C.F.R. § 1.861-1 states: “Categories of income. Part I (sections 861 and following) subchapter N, chapter 1 of the Code, and the regulations thereunder determine the sources of income for purposes of the income tax.”

Title 26, C.F.R. § 1.861-8(a) states: “Sections 861(b) and 863(a) state in general terms how to determine taxable income of a taxpayer from sources within the United States after gross income from sources within the United States has been determined.”

Title 26, C.F.R. § 1.863-1(c) states: “Determination of taxable income. The taxpayer’s taxable income from sources within or without the United States will be determined under the rules of §§ 1.861-8 through 1.861-14T for determining taxable income from sources within the United States.”⁷

Where did Larken Rose⁸ and Clayton get the idea that the “section 861 source

⁶ This paragraph is one contained in Clayton’s trial brief (Doc. 40), a section of which discussed the issue of estoppel in criminal cases.

⁷ The indented portion above is a quote from Clayton’s requested jury instruction 43 (Doc. 51).

⁸ Larken Rose is represented in his appeal to the Third Circuit by Peter Goldberger, an attorney from Ardmore, Pennsylvania.

rules” are relevant for determining the sources of income for purposes of the income tax? They got this idea from the Secretary of the Treasury and the Commissioner of Internal Revenue, of course. Are Clayton and Rose under some duty to disbelieve the words of these public officials, or do they, via the authorities noted above, have a right to believe what they say?

It is alleged that the legal duties arising from the tax laws are clearly known to all, but there are a few exceptions to this rule. For example, in *United States v. Critzer*, 498 F.2d 1160 (4th Cir. 1974), at issue was the validity of the conviction of an Indian for tax evasion. Here, the Bureau of Indian Affairs had informed Mrs. Critzer that the money she derived from real property located within a reservation was not taxable; Mrs. Critzer relied upon this advice and failed to report such income. But, the IRS maintained a contrary position, had her indicted and secured her conviction for tax evasion. This conviction was reversed on the grounds that the unsettled nature of this field of law precluded any conviction:

"While the record amply supports the conclusion that the underreporting was intentional, the record also reflects that, concededly, **whether defendant's unreported income was taxable is problematical and the government is in dispute with itself** as to whether the omitted income was taxable," *Id.*, at 1160.

"We hold that defendant must be exonerated from the charges lodged against her. As a matter of law, defendant cannot be guilty of willfully evading and defeating income taxes on income, the taxability of which is so uncertain that **even co-ordinate branches of the United States Government plausibly reach directly opposing conclusions**. As a matter of law, the requisite intent

to evade and defeat income taxes is missing. The obligation to pay is so problematical that defendant's actual intent is irrelevant. Even if she had consulted the law and sought to guide herself accordingly, she could have had no certainty as to what the law required.

"It is settled that when the law is vague or highly debatable, a defendant-actually or imputedly - lacks the requisite intent to violate it," *Id.*, at 1162. [emphasis added]

This single case is an adequate demonstration that there is at least one part of the tax code which is unclear and that lack of clarity caused the reversal of Mrs. Critzer's criminal conviction. But there are others; see *United States v. Mallas*, 762 F.2d 361 (4th Cir. 1985)(a prosecution for violating an unclear legal duty abridges principles of due process); *United States v. Garber*, 607 F.2d 92, 97-98 (5th Cir. 1979); *United States v. Dahlstrom*, 713 F.2d 1423, 1429 (9th Cir. 1983); *United States v. Heller*, 830 F.2d 150 (11th Cir. 1987); and *United States v. Harris*, 942 F.2d 1125 (7th Cir. 1991). Vague legal duties in other fields of law besides tax likewise prevent criminal convictions on due process grounds; see *United States v. Insko*, 496 F.2d 204 (5th Cir. 1974); *People v. Dempster*, 396 Mich. 700, 242 N.W.2d 381 (1976); *United States v. Anzalone*, 766 F.2d 676, 681-82 (1st Cir. 1985); *United States v. Denmark*, 779 F.2d 1559 (11th Cir. 1986); *United States v. Varbel*, 780 F.2d 758, 762 (9th Cir. 1986); *United States v. Dela Espriella*, 781 F.2d 1432 (9th Cir. 1986); and *United States v. Larson*, 796 F.2d 244 (8th Cir. 1986).

Here, it is perfectly clear that both the Secretary of the Treasury and the CIR

have informed the American public via duly published regulations that the source rules as set forth in “section 861” are to be used to determine taxable income.⁹ It is undoubted that this position was believed by both Rose and Clayton, who acted upon the words of the Secretary of the Treasury and the CIR, even to the extent of drafting briefs regarding the issue that were attached to Clayton’s amended tax returns.¹⁰ But officials in government, particularly DoJ officers and U.S. Attorneys, disagree with the Secretary of the Treasury and the CIR, and have indicted and secured the convictions of both Rose and Clayton. How different is this scenario from that involving Mrs. Critzer or Garber?

At trial, Clayton asserted as a defense to counts 1 and 2 of the indictment that the amended returns he filed were claims for refunds, not false returns. As pointed out in Clayton’s opening brief, prosecution witness Leah Swicegood testified during trial that the alleged false returns Clayton filed with the IRS (G.Exs. 18, 18B, 21 and 21B), were claims for refunds, and prosecution witness David Smith, Clayton’s CPA, testified similarly. Clayton testified at length that he was submitting these documents as claims for refund. These undisputed facts proven at trial thus became the basis for

⁹ These statements of these public officials that appear in duly published agency regulations are entitled to some degree of *Chevron* deference.

¹⁰ See G.Exs. 18, 18B, 21 and 21B. Clayton attached copies of these regulations as exhibits to these amended tax returns.

Clayton's requested theory of defense jury instructions numbered 24 and 45. In his opening brief, Clayton, via a circuit-by-circuit survey of relevant decisional authorities, abundantly showed that these theory of defense jury instructions should have been given.

The Government's reply to this issue is summarized in a single sentence of its brief (br. at p. 26): "the instructions proffered by defendant, although a correct statement of the legal principles underlying an administrative refund claim and refund suit, were not applicable to the *factual issues* in this case" [emphasis added]. This is no argument at all, and is nothing more than an attempt to avoid facts adverse to the Government's position, about which there was abundant trial testimony.

In his opening brief, Clayton set forth the test established by this court regarding the requirement of giving theory of defense instructions to the jury: "it is reversible error to refuse a charge on a defense theory for which there is an evidentiary foundation and which, if believed by the jury, would be legally sufficient to render the accused innocent." See *United States v. Lewis*, 592 F.2d 1282, 1285 (5th Cir. 1979). These same elements regarding theory of defense instructions were stated as follows in *Strauss v. United States*, 376 F.2d 416, 419 (5th Cir. 1967):

"It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence. * * * If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to

charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge directs a verdict on that issue against the defendant. This is impermissible."¹¹

This is the same test that other courts have established concerning the giving of theory of defense jury instructions. For example, in *United States v. Opdahl*, 930 F.2d 1530, 1533 (11th Cir. 1991), the standard for theory of defense instructions was stated as follows:

"The district court's refusal to deliver a jury instruction requested by defendant constitutes reversible error if the instruction '(1) is correct, (2) is not substantially covered by other instructions which were delivered, and (3) deals with some point in the trial so 'vital that the failure to give the requested instruction seriously impaired the defendant's ability to defend.' "

In *United States v. GAF Corp.*, 928 F.2d 1253, 1262 (2nd Cir. 1991), that court, in reversing some criminal convictions, stated the general rule by simply quoting other cases:

" '[A] criminal defendant is entitled to instructions relating to his theory of defense, for which there is some foundation in the proof, no matter how tenuous that defense may appear to the trial court'; * * * '[i]t is well established that '[a] criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible that evidence may be.' "

Finally in *United States v. Garner*, 529 F.2d 962, 970 (6th Cir. 1976), that court stated the general rule in the following fashion:

¹¹ This case and the following were cited and quoted in Clayton's trial brief (Doc. 40).

"In a criminal case it is reversible error for a trial Judge to refuse to present adequately a defendant's theory of defense.

"[W]hen a theory of defense finds some support in the evidence and in the law, a defendant is entitled to some mention of that theory in the instructions. * * * Even when the supporting evidence is weak or of doubtful credibility its presence requires an instruction on the theory of defense."

Here, Clayton meets each of these tests, Fifth Circuit and otherwise. In order to be entitled to a theory of defense jury instruction, there must be a factual basis for the same. Clayton more than adequately demonstrated in his opening brief the factual basis for giving his requested instructions 24 and 45, and the Government admits here that the requested jury instructions were legally correct (br. at p. 26). There being evidence to support the requested instructions which were admittedly correct, the sole remaining issue is whether the instructions were needed for the defense. If the jury in this case concluded that Clayton was submitting claims for refunds and not false returns, it would have acquitted him, hence the dire need for these requested instructions. To argue as the Government does here that there was no factual basis for these requested instructions is simply an attempt to ignore the trial testimony and evidence.

The trial court thus committed error is refusing to instruct as Clayton requested.

ISSUE 3: Did the district court err in denying Clayton's post-trial motion for judgment of acquittal regarding counts 1 and 2?

In his opening brief, Clayton pointed out that when evidence of the commission of a crime is evenly balanced, a conviction must be set aside; see Clayton's opening brief at p. 50. Here, 3 witnesses, including IRS witness Swicegood, testified that the alleged false returns were claims for refunds. The asserted falsity of Clayton's amended returns (G.Exs. 18, 18B, 21 and 21B) arose solely by comparison of those returns with the original returns for 1997 and 1998 (G.Exs. 17 and 20). Clayton contends that the testimony of 3 witnesses, one of whom was a prosecution witness, is far weightier than any inference arising solely from comparison of the returns in question.

In *United States v. Delay*, 440 F.2d 566, 568 (7th Cir. 1971), at issue was the conviction of Delay for theft of cars moving in interstate commerce. The evidence connecting Delay to this crime arose solely from his endorsement of checks given by the purchaser of the cars, which that court held was insufficient to affirm the conviction: "[w]here the evidence as to an element of a crime is equally consistent with a theory of innocence as a theory of guilt, that evidence necessarily fails to establish guilt beyond a reasonable doubt."

In *United States v. Harris*, 942 F.2d 1125, 1130 (7th Cir. 1991), some "ladies of the evening" (twin sisters) were charged with tax crimes for failure to report and pay taxes on the funds they received from their wealthy patron. These apparently

attractive defendants contended they received gifts from this man, and thus their money was not taxable. No evidence was offered in that case regarding the intent of the deceased patron, and the sole testimony regarding intent came from the defendants. Weighing these facts, the court reversed the convictions: “The evidence does not support a finding of guilt beyond a reasonable doubt, and we reverse Conley's conviction and remand with instructions to dismiss the indictment against her.” These two cases are relevant to this appeal.

Here, the trial transcript (in the specific places noted in Clayton’s opening brief) plainly discloses that all witnesses called to testify about the falsity of Clayton’s questioned returns testified that they were really claims for refunds. There was no witness who testified that the questioned returns were false. On balance, the weight of the evidence in this respect overwhelmingly favored Clayton’s position that these returns were really claims for refunds.

But casting aside all testimony regarding these returns, analysis of the questioned returns with the original returns still leaves the evidence evenly balanced. The original 1997 and 1998 returns (G.Exs. 17 and 20) were accurate. In the following years, Clayton filed the questioned returns (G.Exs. 18, 18B, 21 and 21B), to which he appended lengthy explanations of his legal argument based on tax regulations. Considering that the law specifically allows one to submit Forms 1040X as claims for

refunds, review of the returns themselves still leaves the evidence evenly balanced: they can be either claims for refunds, or false. Since all evidence in this case shows that the evidence was at least evenly balanced as to whether these returns were false, judgments of acquittal should have been entered in Clayton's favor on these counts.

The Government's discussion of this issue is woefully inadequate. Its "statement of the facts" of this case is extremely short, and the facts it mentions in its reply to this issue are minimal. All the Government does in its brief is merely point out a few facts in its favor, essentially ignoring the issue presented by Clayton. Since the Government should have addressed whether the evidence was evenly balanced, its failure to do so is indicative that Clayton is correct.

The district court erred by not granting Clayton's motion for judgments of acquittal regarding counts 1 and 2 of the indictment.

CONCLUSION

For the reasons noted above, Clayton's convictions must be reversed.

Respectfully submitted this the 20th day of April, 2007.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), I certify, based on the word-counting function of my word processing system (WordPerfect, Version 11), that this brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B):

1. Exclusive of the exempted portions specified in Fed.R.App.P. 32(a)(7)(B)(iii), this reply brief contains fewer than 7,000 words, to wit, less than 6,900 words;

2. The brief has been prepared in a proportional spaced format using Times New Roman type (14 point type).

Lowell H. Becraft, Jr.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing brief 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 them at their correct mailing addresses:

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Dated this the 20th day of April, 2007.

Lowell H. Becraft, Jr.