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5.00 PLEAS AND SENTENCING: TAX DIVISION POLICY AND GUIDELINES

5.01 GENERALLY

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) created the United States Sentencing Commission (Commission) as an independent agency in the judicial branch. The Commission's task was the development of guidelines to further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. Accordingly, the Commission promulgated the United States Sentencing Guidelines (USSG) which became effective on November 1, 1987, and apply to all offenses committed on or after that date. Courts have recognized that the guidelines also apply to any offense involving a continuing course of conduct that began before November 1, 1987, but continues thereafter. *United States v. Dale*, 991 F.2d 819, 853 (D.C. Cir.), *cert. denied*, 114 S. Ct. 286, 650 (1993) (citing cases); *United States v. Gaudet*, 966 F.2d 959, 961-62 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1294 (1993).

In compliance with the mandate of the Act, the Commission created categories of offense behavior and offender characteristics. The Commission prescribed Guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories. When the guidelines require imprisonment, the range must be narrow, with the maximum range not exceeding the minimum by more than the greater of 25 percent or six months. 28 U.S.C. § 994(b)(2).

The guidelines contain three types of text: (1) the actual Guideline provisions; (2) the policy statements; and (3) commentary. The guidelines themselves are binding on the sentencing court unless the court finds the presence of an aggravating or mitigating factor of a kind or to a degree not given adequate consideration by the Commission. *Mistretta v. United States*, 488 U.S. 361, 391 (1989). Likewise, policy statements are binding on federal courts. *Williams v. United States*, 112 S. Ct. 1112, 1119 (1992). The Supreme Court recently held that "[c]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution, or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that

guideline." *United States v. Stinson*, 113 S. Ct. 1913, 1915 (1993). Thus, all three varieties of text are binding on a sentencing court.

The Commission has the authority to submit Guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless legislation is enacted to the contrary. 28 U.S.C. § 944(p). The Commission has amended the guidelines regularly since their initial promulgation.

5.02 *GENERAL APPLICATION PRINCIPLES*5.02[1] *Select the Appropriate Guidelines Manual*

Section 1B1.11(a) mandates that a court "shall use the Guidelines Manual in effect on the date that the defendant is sentenced." The same is true of policy statements. *United States v. Schram*, 9 F.3d 741, 742 (9th Cir. 1993). If the court determines, however, that the use of that Manual would violate the *ex post facto* clause, the court "shall use the Guidelines Manual in effect on the date that the offense was committed." USSG §1B1.11(b)(1).¹ Thus, if the sentencing Guideline in effect at the time the offense was committed is more favorable to the defendant than the Guideline at the time of sentencing, the court must apply the more favorable Guideline. *United States v. Chasmer*, 952 F.2d 50, 52 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1703 (1992). Section 1B1.11 establishes the "one book" rule. This rule provides that the "Guidelines Manual in effect on a particular date shall be applied in its entirety." USSG §1B1.11(b)(2). When a court applies an earlier edition of the guidelines Manual, the court also must consider subsequent amendments when such amendments represent merely clarification rather than substantive changes. USSG §1B1.11(b)(2).

Some offenses, such as conspiracy, escape, and continuing criminal enterprise are continuing offenses. For continuing offenses, the guidelines apply if the offense continues until after the effective date of the guidelines. Thus, in these so-called "straddle cases," there is no *ex post facto* violation in applying guidelines which were in effect when the last affirmative act occurred rather than an earlier version which was in effect when the conspiracy began, even though the later version specified a higher offense level for the same conduct. *United States v. Hirschfeld*, 964 F.2d 318, 325 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1067 (1993); *United States v. Walton*, 908 F.2d 1289, 1299 (6th Cir.), *cert. denied*, 498 U.S. 990 (1990); *United States v. Walker*, 885 F.2d 1353, 1354 (8th Cir. 1989); *United States v. Stanberry*, 963 F.2d 1323 (10th Cir. 1992). Note, however, that one court has found that acts occurring after November 1987 which merely cover up a conspiracy and, thus, are not done in furtherance of the conspiracy, do not extend the life of a conspiracy or make the guidelines applicable to the conspiracy. *United States v. Crozier*, 987 F.2d 893, 902 (2d Cir. 1993).

5.02[2] *Guideline Calculation*

After determining which guidelines Manual applies to the case, the attorney should next follow the steps outlined in the Manual in order to calculate the appropriate Guideline range:

- (a) Determine the applicable offense Guideline section from Chapter Two. *See* Section 1B1.2 and 2T1.
- (b) Determine the base offense level and apply any appropriate specific offense characteristics contained in the particular Guideline in Chapter Two in the order listed.
- (c) Apply the adjustments related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

- (d) If there are multiple counts of conviction, repeat steps (a) through (c) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.
- (e) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.
- (f) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.
- (g) Determine the Guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.
- (h) For the particular Guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.
- (i) Refer to Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.
- (j) Check to make sure that the calculation complies with Department of Justice policies. For example, compute the possible Guideline range for each count of an indictment or information prior to accepting a plea to a single count to ensure that the plea is consistent with the Tax Division's major count policy.²

See USSG §1B1.1.

5.03 CALCULATING THE BASE OFFENSE LEVEL IN TAX CASES 1

Consistent with the overall plan of the Sentencing Guidelines, each tax guideline begins with a base offense level. This starting point for tax crimes is based upon the dollar amount found in the tax table at section 2T4.1. Most guidelines also contain "specific offense characteristics" which require the base offense level to be increased based on certain aggregating facts. The court determines the total offense level by making adjustments as described in section 1B1.1 of the guidelines. Following the determination of the total offense level, the court refers to the corresponding zone on the sentencing table. The sentencing table has three zones, Zone A, Zone B and Zone C, which permit the court to render a variety of sentences ranging from probation to split sentences to many months in prison.

5.03[1] *The Base Offense Level*

Part T of Chapter Two of the Sentencing Guidelines contains the materials pertaining to tax crimes. In determining the starting point for the base offense level, most offenses refer to the "tax loss" as defined in the various subsections. See *United States v. Moore*, 997 F.2d 55, 60-61 (5th Cir. 1993).

In determining the tax loss, both charged and uncharged conduct are properly considered. *United States v. Meek*, 998 F.2d 776, 781 (10th Cir. 1993); *United States v. Higgins*, 2 F.3d 1094, 1097-98 (10th Cir. 1993). Some confusion on this point arose from the decision in *United States v. Daniel*, 956 F.2d 540, 544 (6th Cir. 1992), with some reading *Daniel* to preclude the inclusion in the "tax loss" calculation of any uncharged conduct. That, however, is an incorrect reading of *Daniel*. *Daniel* merely held that insofar as uncharged conduct consisted of civil tax liability, it could not be considered in determining "tax loss." "*Daniel* is best interpreted as standing only for the proposition that a sentencing court may not consider non-charged civil violations of the tax code in calculating the tax loss attributable to a defendant under § 2T1.1." *Meek*, 998 F.2d at 783. Accord *United States v. Harvey*, 996 F.2d 919, 922 (7th Cir. 1993) (*Daniel* only holds that tax loss attributable to criminal activity must be reliably computed, and civil tax liability is not an adequate substitute for "tax loss"). Indeed, the Sixth Circuit itself has subsequently made clear that *Daniel* stands only for the proposition that civil tax liability is not part of the underlying conduct which may be taken into account in calculating the "tax loss" for sentencing purposes. *United States v. Pierce*, 17 F.3d 146, 150 (6th Cir. 1994). Acquitted conduct can also be taken into account in calculating "tax loss." *United States v. August*, 984 F.2d 705, 713 (6th Cir. 1992).

Tax loss from both guideline and pre-guideline years may be used to arrive at the total loss figures on which the guideline range is based. *United States v. Stokes*, 998 F.2d 279 (5th Cir. 1993); *United States v. Kienenberg*, 13 F.3d 1354 (9th Cir. 1994); *United States v. Pierce*, 17 F.3d at 150. Moreover, the loss from years barred by the statute of limitations can be used in computing "tax loss." *United States v. August*, 984 F.2d at 713. If a defendant is charged and convicted of both Guideline offenses and pre-Guideline offenses, the defendant may be sentenced to consecutive terms of imprisonment. *United States v. Garcia*, 903 F.2d 1022, 1025 (5th Cir. 1990).

Likewise, future tax loss may be included in tax loss computation in certain situations. Relying on the commentary of section 2T1.3, the Fourth Circuit found that tax loss could be determined by calculating 28% of a false deduction even when there was no loss of tax revenue because it "set the groundwork for evasion of a tax that was expected to become due in the future." *United States v. Hirschfeld*, 964 F.2d 318, 325 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1067 (1993). *Accord United States v. Lorenzo*, 995 F.2d 1448, 1459-60 (9th Cir. 1993) (loss for falsely claimed tax refunds based on intended loss, not actual loss; nor does that intended loss need to be realistic).

Courts have found that payment of the taxes before sentencing does not alter the tax loss or offense level under the guidelines. *United States v. Pollen*, 978 F.2d 78, 91 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 2332 (1993); *United States v. Mathis*, 980 F.2d 496, 497 (8th Cir. 1992).

Once the court determines the total tax loss attributable to a defendant, the defendant's base offense level is determined from the table contained in section 2T4.1. *United States v. Meek*, 998 F.2d 776, 781 (10th Cir. 1993).

5.03[1][a] *Section 7201*

Prior to the November 1, 1993, amendments,³

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5.03[1][a] *Section 7201*

Prior to the November 1, 1993, amendments,⁴ "tax loss" in evasion cases is "the greater of: (A) the total amount of tax that the taxpayer evaded or attempted to evade; and (B) the 'tax loss' defined in § 2T1.3."¹ USSG §2T1.1(a). This amount does not include penalties or interest. USSG §2T1.1, comment. (n.2). Tax loss is what is commonly called the "criminal deficiency," an amount which is determined by the same rules applicable in determining any other sentencing factor. USSG §2T1.1, comment. (n.2). Application Note 3 provides that in determining the total tax loss attributable to the offense, "all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated." USSG §2T1.1, comment. (n.3).

This tax loss calculation has been described as follows:

In determining the tax loss, a court is required to engage in a two-step analysis. First, the court must decide which tax deficiencies to aggregate together. Second, it must decide how to calculate the amount of the aggregated deficiencies. *The aggregation determination is addressed by § 3D1.2, which requires aggregation of all counts of conviction "involving substantially the same harm," and § 1B1.3, which requires aggregation of all "relevant conduct," when determining a defendant's base level offense.* The formula for calculating the amount of the aggregated deficiencies is provided by §§ 2T1.1(a) and 2T1.3(a), which define the tax loss for any given year as the greater of the "total amount of tax that the defendant evaded or attempted to evade" . . . or "28% of the amount by which the greater of gross income and taxable income was understated, plus 100 percent of the total amount of any false credits claimed against the tax"

United States v. Meek, 998 F.2d 776, 781 (10th Cir. 1993) (emphasis added).²

¹ See Section 5.03[1][c], *infra*.

² At least one court has rejected a due process challenge to section 2T1.3(a)(1). The defendant in *United States v. Barski*, 968 F.2d 936 (9th Cir. 1993), maintained that section 2T1.3 created an irrebuttable presumption that tax loss is 28 percent of unreported taxable income when, in fact, the

Under section 1B1.3 of the guidelines a defendant's base offense level is determined on the basis of:

all acts and omissions committed or aided and abetted by the defendant, or *for which the defendant would be otherwise accountable*, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense . . .

USSG §1B1.3 (emphasis added). In *United States v. Charroux*, 3 F.3d 827 (5th Cir. 1993), the defendants were convicted of attempted evasion and conspiracy. Relying on the commentary to section 1B1.3, the *Charroux* court held each defendant responsible not only for the tax loss which he caused, but also for the tax loss caused by his co-defendant.³ 3 F.3d at 838.

The Seventh Circuit relied on the tax loss definitions contained in 2T1.3 and 2T1.1 to determine the tax loss in an evasion of payment case in *United States v. Brimberry*, 961 F.2d 1286, 1292 (7th Cir. 1992). In *Brimberry*, the defendant had attempted to evade payment of taxes of \$7 million and had hidden assets of approximately \$77,000 to avoid paying the taxes. The court found that the language of the guidelines was unambiguous and that the correct basis for tax loss based on all of the conduct violating the tax laws was \$7 million. *Brimberry*, 961 F.2d at 1292.

amount was less. The *Barski* court found that the section merely "establishes the legally operative fact as the amount of unreported income." *Barski*, 968 F.2d at 937.

³ Conduct for which the defendant would otherwise be accountable includes conduct of others in furtherance of the execution of a jointly-undertaken criminal activity that was reasonable foreseeable to the other defendant. USSG §1B1.3, comment. (n.1). Changes to this guideline were also made by the November 1, 1993, amendments.

Note that when a defendant has skimmed corporate receipts, the defendant is liable not only for the understatement of corporate income, but also for the understatement of his personal income. *United States v. Dale*, 991 F.2d 819, 856 (D.C. Cir.), *cert. denied*, 114 S. Ct. 286, 650 (1993). If the defendant is a corporation, the court is to use 34 percent in lieu of 28 percent. USSG §2T1.3(a). This use of either 28 percent or 34 percent "applies the highest marginal rate to the amount of concealed income, disregarding deductions that would have been available had the taxpayer filed an honest return." *United States v. Harvey*, 996 F.2d 919, 920 (7th Cir. 1993).

5.03[1][b] *Section 7203*

The base offense level for cases involving willful failure to file a return, supply information, or pay tax in violation of 26 U.S.C. § 7203 is governed by section 2T1.2 of the guidelines.⁵ Again, the base offense level is governed by tax loss. For purposes of violations of this section, tax loss is defined as "the total amount of tax that the taxpayer owed and did not pay" or "not less than 10 percent of the amount by which the taxpayer's gross income for that year exceeded \$20,000." USSG §2T1.2(a). The alternative measure of the tax loss, 10 percent of gross income over \$20,000, is provided because of the potential difficulty in determining the amount a taxpayer owed. USSG §2T1.2, comment. (backg'd.).

5.03[1][c] *Section 7206(1)*

Section 2T1.3 of the guidelines governs tax loss for violations of 26 U.S.C. § 7206(1).⁶ Section 2T1.3(a) provides that the base offense level be taken from the tax table at section 2T4.1 if the offense was committed to facilitate evasion of a tax. In the alternative, the base offense level is 6. USSG §2T1.3(b). For purposes of the Guideline, the tax loss is 28 percent of the amount by which the greater of gross income and taxable income was understated, plus 100 percent of the total amount of any false credits claimed against tax. USSG §2T1.3. If the taxpayer is a corporation, the amount is 34 percent rather than 28 percent. USSG §2T1.3. Noting that tax loss is not an element of section 7206(1), the guidelines provide a calculation to assist in gauging the seriousness of the offense. USSG §2T1.3, comment. (backg'd.). Thus, the commentary to this section provides directions for this calculation:

The amount by which the greater of gross income and taxable income was understated, plus 100 percent of the total amount of any false credits claimed against tax is calculated as follows: (1) determine the amount, if any, by which the gross income was understated; (2) determine the amount, if any, by which the taxable income was understated; and (3) determine the amount of any false credit(s) claimed (a tax "credit" is an item that reduces the amount of tax directly; in contrast, a 'deduction' is an item that reduces the amount of taxable income). Use the amount determined under step (1) or (2) whichever is greater, plus any amount determined under step (3).

USSG §2T1.3, comment. (n.4). This calculation disregards deductions that would have been available had the taxpayer filed an honest return. *United States v. Harvey*, 996 F.2d 919, 920 (7th Cir. 1993).

In determining the total tax loss attributable to the offense, "all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated." USSG §2T1.3, comment. (n.3). Thus, "[i]f one person causes two taxpayers to understate their incomes, both underpayments count." *Harvey*, 996 F.2d at 921.

5.03[1][d] *Section 7206(2)*

The tax loss for defendants who have aided, assisted, procured, counseled, or advised tax fraud is governed by section 2T1.4.⁷ This section provides that the base offense level be taken from the tax table level corresponding to the resulting tax loss, if any, or otherwise a level of 6.⁴ USSG §2T1.4(a)(1) and (2). Tax loss is defined as "the tax loss, as defined in §2T1.3, resulting from the defendant's aid, assistance, procurance or advice."⁵ USSG §2T1.4(a).

The amount of tax loss attributable to parties sentenced for aiding, assisting, procuring, counselling, or advising tax fraud, as well as making false statements on tax returns, is calculated in a manner similar to that of evasion. *United States v. Moore*, 997 F.2d 55, 60 (5th Cir. 1993). If the defendant advises others to violate their tax obligations through filing returns which have no support in the tax laws and which are, consequently, false, the misstatements in all such returns will contribute to one aggregate tax loss. USSG §2T1.4, comment. (n.4). This is true whether or not the principals were aware of their falsity. USSG §2T1.4, comment. (n.4). Although tax loss is not an element in a false statement case, the defendant is properly sentenced for tax loss, which includes the amount of money a defendant attempts to obtain from an illegal tax scheme, regardless of an eventual failure to actually acquire and retain their illegal funds. *Moore*, 997 F.2d at 59-60. *But cf. United States v. Schmidt*, 935 F.2d 1440, 1451 (4th Cir. 1991) (holding that actual tax loss was proper basis for computing tax loss).

5.03[1][e] *Section 7212(a)*

⁴ If the defendant is a tax preparer or adviser, his offense will be increased by two levels. USSG §2T1.4(b)(3).

⁵ See Section 5.03[1][c], *supra*.

The omnibus clause of 26 U.S.C. § 7212(a) prohibits a defendant from corruptly obstructing or impeding, or endeavoring to obstruct or impede, the due administration of Title 26. The section is aimed at "prohibiting efforts to impede 'the collection of one's taxes, the taxes of another, or the auditing of one's or another's tax records.'" *United States v. Hanson*, 2 F.3d 942, 947 (9th Cir. 1993) (citing *United States v. Kuball*, 976 F.2d 529, 531 (9th Cir. 1992)).

The statutory index to the Sentencing Guidelines, USSG Appendix A, specifies that section 2A2.2, Aggravated Assault, and section 2A2.3, Minor Assault, are the guidelines ordinarily applied to a violation of 26 U.S.C. § 7212(a). However, the introduction cautions that:

If, *in an atypical case*, the guideline section indicated for the statute of conviction is inappropriate because of the particular

conduct involved, use the guideline section most applicable to the nature of the offense conduct charged in the count of which the defendant was convicted.

USSG App. A (emphasis added). Thus, courts have not applied the assault Guideline to convictions under the section 7212(a) omnibus clause. *United States v. Dykstra*, 991 F.2d 450, 454 (8th Cir.), *cert denied*, No. 93-5178 (U.S. Oct. 4, 1993); *see Hanson*, 2 F.3d at 947; *United States v. Shriver*, 967 F.2d 572, 574 (11th Cir. 1992).

The Eleventh Circuit in *Shriver* declined to apply the assault guidelines after finding that a defendant's section 7212(a) omnibus clause conviction was supported by evidence of his transferring real estate to his spouse and by filing an altered Lien Notice in an attempt to cause the release of that lien. The court decided that the Guideline which most closely tracked the defendant's actions was section 2F1.1, which governs sentencing in cases of fraud and deceit. *Shriver*, 967 F.2d at 573-74. Likewise, the Ninth Circuit declined to apply the assault guidelines in *Hanson*. The defendant in *Hanson* filed a false return seeking a refund and filed various false 1096 and 1099 forms. The court found that the Guideline most analogous to the defendant's conduct was section 2T1.5, which governs the sentencing of section 7207 offenses involving fraudulent returns, statements, or other documents. *Hanson*, 2 F.3d at 947.

The Eighth Circuit decided that the most appropriate guideline to be applied to section 7212(a) omnibus clause violations was the general obstruction of justice guideline, USSG §2J1.2.⁸ *United States v. Dykstra*, 991 F.2d at 454. The *Dykstra* court noted that "the language and structure of § 7212 track part of certain federal obstruction of justice statutes," and that courts have used those statutes to interpret section 7212(a). *Dykstra*, 991 F.2d at 454. Accordingly, the court approved the application of the general obstruction of justice guideline, USSG §2J1.2, in sentencing section 7212(a) omnibus clause violations. *Dykstra*, 991 F.2d at 454. The amendments to the Sentencing Guidelines which went into effect on November 1, 1993, include a new reference in the statutory index for section 7212(a) omnibus clause violations, indicating that normally either

section 2J1.2, Obstruction of Justice, or section 2T1.1, Tax Evasion, should be applied.

5.03[1][f] *Section 371*

Section 2T1.9 of the guidelines governs conspiracies to "defraud the United States by impeding, impairing, obstructing and defeating . . . the collection of revenue." USSG §2T1.9, comment. (n.1). The section applies to what is commonly called a "Klein conspiracy" as described in *United States v. Klein*, 247 F.2d, 915 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958). The Guideline does not apply to taxpayers, such as husband and wife, who evade taxes jointly or file a fraudulent return. USSG §2T1.9, comment. (n.1). The Guideline directs the court to use the base offense level as determined by section 2T1.1 or section 2T1.3, whichever is applicable to the underlying conduct if that offense level is greater than 10. USSG §2T1.9, comment. (n.2). Otherwise, the base offense level is 10. USSG §2T1.9, comment. (n.2).

When a defendant is convicted of a count charging a conspiracy to commit more than one offense, the court is directed to treat that conviction "as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." USSG §1B1.2(d). After calculating the offense level for each such "separate" conspiracy, the sentencing court then must "group the various offenses such that instead of sentencing the defendant for each object offense, the court would sentence the defendants on the basis of only one of the offenses." *United States v. Dale*, 991 F.2d 819, 854 (D.C. Cir.), *cert. denied*, 114 S. Ct. 286, 650 (1993) (citing section 3D1.2 of the guidelines). The court then must sentence according to the offense level for the most serious counts comprising the group. *Dale*, 991 F.2d at 854 (citing section 3D1.3 of the guidelines).

The offense level is based on the amount that the conspiracy "evaded or attempted to evade" according to section 2T1.1. *Dale*, 991 F.2d at 854. The Fifth Circuit has found that it is proper to sentence each of two defendants on the total tax loss caused by both defendants. *United States v.*

Charroux, 3 F.3d 827, 838 (5th Cir. 1993). Again, whether the conspirators completed the offense is irrelevant for purposes of determining this offense level. *United States v. Dale*, 991 F.2d at 855; *United States v. Hirschfeld*, 964 F.2d 318, 325 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1067 (1993).

The Third Circuit addressed the tax loss issue in the context of a computation based on uncharged conduct in a conspiracy in *United States v. Seligsohn*, 981 F.2d 1418 (3d Cir. 1992). In *Seligsohn*, the defendants paid cash as part of wages earned by employees, underreported their total payroll, filed false reports to the IRS regarding withholding taxes, and deprived a union welfare plan of its entitlement. Although the indictments charged only personal tax fraud conspiracy violations, the defendants' sentences were based upon a tax loss attributable to the defendants' companies rather than only the amount of individual loss. *Seligsohn*, 981 F.2d at 1427. The court found that the tax fraud conspiracy was "clearly intended to encompass the tax losses attributable to the employees of the defendants' companies as well as the losses from the defendants' own personal tax evasion." *Seligsohn*, 981 F.2d at 1427. In *United States v. Lorenzo*, 995 F.2d 1448, 1459-60 (9th Cir. 1993), a tax protestor case, the court held each of the defendants accountable for the total of the falsely claimed tax refunds, approximately \$4.9 million. In finding the co-conspirators responsible for all the reasonably foreseeable conduct of the other co-conspirators, the court relied on information presented against co-defendants. *Lorenzo*, 995 F.2d at 1459-60.

5.03[2] *Specific Offense Characteristics*

In addition to determining the base offense level from the table at section 2T4.1, the sentencing court must adjust the offense level according to the dictates of the specific offense characteristics of each subsection.⁹

5.03[2][a] *Illegal Source Income*

The subsections dealing with violations of 26 U.S.C. §§ 7201, 7203, and 7206, with the exception of section 7206(2), require an increase in base offense level if the defendant either failed to report or to correctly identify income of over \$10,000 in any year which results from criminal activity. "Criminal activity" is defined as "any conduct constituting a criminal offense under federal, state or local law." The Fourth Circuit reversed a lower court determination that a defendant's illegal source income of \$8000 for 1987 and \$2000 for 1988 could support the two-level enhancement. *United States v. Schmidt*, 935 F.2d 1440, 1451-2 (4th Cir. 1991), *appeal after remand*, 983 F.2d 1058 (4th Cir. 1992). At least one circuit has determined that the plain language of the guidelines prevents a sentencing court from enhancing the base offense level of a defendant who received income exceeding \$10,000 from a fraudulent scheme perpetrated in Canada. See *United States v. Ford*, 989 F.2d 347, 350 (9th Cir. 1993). The amendments which went into effect on November 1, 1993, however, add the term "foreign" law to the definition of "criminal activity." USSG §2T1.1, comment. (n.3) (Nov. 1993).

5.03[2][b] *Sophisticated Means*

The tax guidelines for violations of 26 U.S.C. §§ 7201, 7203, and 7206 provide for a two-level enhancement of the base offense level if the defendant used sophisticated means to impede discovery of the nature or extent of the offense. "Sophisticated means" is defined as conduct that is "more complex or demonstrates greater intricacy or planning than a routine tax evasion case." The use of offshore bank accounts or transactions through corporate shells are offered as examples of "sophisticated means" in the guidelines commentary.

An example of sophisticated means can be found in *United States v. Becker*, 965 F.2d 383, 390 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1411 (1993). In *Becker*, the defendant received a two point enhancement pursuant to section 2T1.2(b)(2) for using a "warehouse bank" to hide his assets,

using a false social security number, eliminating all bank accounts in his own name, and depositing his earnings in his son's account. The appellate court agreed with the sentencing court's conclusion that these acts constituted sophisticated means which made it "difficult, if not impossible, to discover . . . [the defendant's] income and to inquire into his finances." *Becker*, 965 F.2d at 390; *See also United States v. Pierce*, 17 F.3d 146, 151 (6th Cir. 1994) (defendant presented an inapplicable IRS publication dealing with nonresident aliens to his employer in order to exempt himself from withholding; used several different mailing addresses from different IRS regional service centers to impede the IRS's discovery of him; changed his excessive number of withholding deductions in accordance with changes in IRS regulations so as not to alert the IRS; and, directed his wife to file misleading returns); *United States v. Charroux*, 3 F.3d 827, 829 (5th Cir. 1993) (elaborate efforts to hide revenues including "land flips"); *United States v. Hammes*, 3 F.3d 1081, 1083 (7th Cir. 1993) (numerous activities, including use of banks in the Cayman Islands, Switzerland, and the Mariana Islands; putting accounts in children's names, using aliases, and destroying records); *United States v. Ford*, 989 F.2d 347, 351 (9th Cir. 1993) (use of foreign corporation to generate corporate foreign tax payments which are claimed on a domestic personal income tax return as foreign tax credits warrants enhancement pursuant to section 2T1.3); *United States v. Jagim*, 978 F.2d 1032, 1042 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 2447 (1993) (extensively planned and executed scheme involving tax shelter and preparation of a number of false returns is more elaborate or carefully planned than routine tax-evasion case).

It is important to distinguish the use of sophisticated means in obtaining the money from the use of sophisticated means in furthering the tax crime. The Fifth Circuit reversed a sentencing court's two-level enhancement of a defendant's base offense level for using sophisticated means in *United States v. Stokes*, 998 F.2d 279 (5th Cir. 1993). In *Stokes*, the defendant had embezzled money from her employer which she put into two separate bank accounts. She then wrote checks to herself and transferred the money into cashiers checks which she used to purchase a car and land.

The trial court found that this behavior impeded discovery and gave a two-level enhancement pursuant to section 2T1.3(b)(2). The Fifth Circuit reversed, finding that the sophisticated means involved the hiding of embezzled funds but not the evasion of taxes, the crime for which the defendant was convicted. *Stokes*, 998 F.2d at 282.

5.04 *RELEVANT CONDUCT*

The provisions of Guideline § 1B1.1 permit a court to consider all of a defendant's relevant conduct in determining the base offense level. The government bears the burden of persuasion on this issue by a preponderance of the evidence. *United States v. De La Rosa*, 922 F.2d 675, 679 (11th Cir. 1991). It is well-established that pre-Guideline conduct may be considered in arriving at the offense level. *United States v. Collins*, 972 F.2d 1385, 1414 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993). Likewise, a court can cross-reference to state law violations even when such violations consist of conduct that is outside the scope of the guidelines. *Id.*; *United States v. Willis*, 925 F.2d 359, 360-62 (10th Cir. 1991); *United States v. Smith*, 910 F.2d 326, 329-30 (6th Cir. 1990). Note, however, that at least one court has found that prosecution for conduct previously used to enhance offense level is barred by the multiple punishment prong of the double jeopardy clause. *United States v. McCormick*, 992 F.2d 437 (2d Cir. 1993). *But see United States v. Cruce*, 21 F.3d 70 (5th Cir. 1994).

5.05 *ROLE IN THE OFFENSE*

The guidelines permit the sentencing court to adjust a defendant's offense level based upon its assessment of each offender's actions and relative culpability in the offense. The offense level may be enhanced by up to four levels upon a finding that the defendant played a leadership role. Upon a finding that a defendant was a "minor participant" in the offense, the court may reduce a defendant's offense level. USSG §3B1.2(b). Either finding is heavily dependent upon the facts of the particular case. *United States v. Gregorio*, 956 F.2d 341, 344 (1st Cir. 1992).

5.05[1] *Leadership Role in the Offense*

Section 3B1.1 permits an increase in the offense level as follows: (a) an increase of 4 levels if the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive; (b) an increase of 3 levels if the defendant was a manager or supervisor of such a criminal activity; or (c) an increase of 2 levels if the defendant was an organizer, leader, manager or supervisor in any criminal activity other than that described in (a) or (b). The purpose of this enhancement is to take into account the relative responsibilities of the participants. *United States v. Schweih*s, 971 F.2d 1302, 1318 (7th Cir. 1992), *on remand*, 1993 WL 157450 (May 12, 1993), *on reconsideration*, 1993 WL 18620 (June 3, 1993). There can be more than one organizer in an extensive criminal operation. *Morphew v. United States*, 909 F.2d 1143, 1145, (8th Cir. 1990).

The circuits are split on whether the language of Guideline section 3B1.1 requires that the sentencing court focus solely on the defendant's role in the offense of conviction rather than other criminal conduct in which he may have engaged. The Sixth Circuit has found that acquitted conduct can be considered. *United States v. August*, 984 F.2d 705, 713 (6th Cir. 1992). *But see United States v. Schweih*s, 971 F.2d at 1317; *United States v. De La Rosa*, 922 F.2d 675, 679 (11th Cir. 1991) (holding that only behavior involved in the offense of conviction may be considered). The Ninth Circuit, however, has held that the 1990 amendment to the introductory commentary to Chapter 3, Part B permits the court to determine the defendant's role based on all of the defendant's conduct and is not limited to the offense of conviction. *United States v. Lillard*, 929 F.2d 500, 503 (9th Cir. 1991). The Third and Tenth Circuits have found that the amended commentary constituted a substantive change, thus permitting the court to consider behavior beyond the offense of conviction only in crimes committed after the date of the November 1, 1990 amendment. *United States v. Pollen*, 978 F.2d 78, 89 (3rd Cir. 1992), *cert. denied*, 113 S. Ct. 2332 (1993); *United States v. Johnson*, 971 F.2d 562, 577 (10th Cir. 1992).

5.05[2] *Minor Role in the Offense*

In order to support a reduction in offense level for his role as a minor participant, the defendant must make a threshold showing that he is "substantially less culpable than the average participant." *United States v. Gregorio*, 956 F.2d 341, 344 (1st Cir 1992); accord *United States v. Ocasio*, 914 F.2d 330, 332 (1st Cir. 1990) (defendant has burden of proving his entitlement to downward adjustment for being a minor participant). The fact that a particular defendant may be the least culpable of the defendants does not, by itself, establish that he was a minor participant. *United States v. Daniel*, 962 F.2d 100, 103 (1st Cir. 1992); *United States v. Zaccardi*, 924 F.2d 201, 203 (11th Cir. 1991).

5.05[3] *Abuse of Position of Trust or Use of a Special Skill*

Section 3B1.3 permits a sentencing court to increase the defendant's base offense level if the court finds that the defendant abused a position of public or private trust, or used a special skill in a manner that significantly facilitated the commission or concealment of the offense. This enhancement may only be given when the use of the position of trust or the special skill contributed in a substantial way to the facilitation of the crime; it should not merely have provided an opportunity that was afforded to others. USSG §3B1.3, comment. (n.1). "Special skill" is defined as a "skill not possessed by members of the general public and usually requiring substantial education, training or licensing" such as pilots, lawyers, doctors, accountants, chemists, and demolition experts. USSG §3B1.3, comment. (n.2). Section 3B1.3 prohibits use of this enhancement in circumstances in which an abuse of trust or a special skill is included in the base offense level or is among the specific offense characteristics of the guideline being applied.

Courts interpreting this provision have found an abuse of trust or use of a special skill in a variety of circumstances. The Tenth Circuit affirmed an abuse of trust enhancement in an embezzlement case, even after acknowledging that "embezzlement by definition involves an abuse

of trust." *United States v. Chimal*, 976 F.2d 608, 613 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1331 (1993). The *Chimal* court held that "embezzlement by someone in a significant position of trust warrants the enhancement when the position of trust substantially facilitated the commission or concealment of the crime." *Chimal*, 976 F.2d at 613-14. Law enforcement officers who use their position to further criminal activity or to conceal their criminal activity may be subject to this enhancement. *United States v. Rehal*, 940 F.2d 1, 5 (1st Cir. 1991) (officer used his position to follow up on the operations of federal investigators inquiring into his activity). Likewise, the Third Circuit found that a drug enforcement officer abused position of trust when he embezzled funds paid in fake drug transaction. *United States v. Brann*, 990 F.2d 98, 102 (3d Cir. 1993). The court noted that "the primary trait that distinguishes a person in a position of trust from one who is not, is the extent to which the position provides the freedom to commit a difficult-to-detect wrong." *Brann*, 940 F.2d at 103 (citation omitted).

In a tax case, the Second Circuit enhanced the sentence of an accountant who used special skills in preparing fraudulent forms during a tax fraud conspiracy. *United States v. Fritzson*, 979 F.2d 21, 22 (2d Cir. 1993). The defendant disputed the propriety of the enhancement, claiming that the forms in question, Forms W-2 and W-3, could be prepared by people without his special skills. The court found that "[a]n accountant's knowledge of the withholding process, including the roles of the claim and transmittal documents, and how and when to file them, exceed[ed] the knowledge of the average person." *Fritzson*, 979 F.2d at 22-23. *But see United States v. Santopietro*, 996 F.2d 17 (2d Cir. 1993) (remand for resentencing of certified public accountant because the sentencing court enhanced the defendant's offense level for use of special skill for bribery conviction instead of for tax conviction).

Note, however, that this enhancement for use of a special skill cannot be used if the defendant regularly acts as a return preparer or advisor for profit and is charged pursuant to 26 U.S.C. § 7206(2). USSG §2T1.4, comment. (n.3). The Specific Offense Characteristics of

section 2T1.4 include a two-level enhancement if the defendant was in the business of preparing or assisting in the preparation of tax returns. USSG §2T1.4(b)(3).

5.06 *GROUPING*

Section 3D1.2 of the guidelines provides that "[a]ll counts involving substantially the same harm shall be grouped together." The purpose is to impose "incremental punishment for significant additional criminal conduct," but at the same time prevent double punishment for essentially the same conduct. *United States v. Seligsohn*, 981 F.2d 1418, 1425 (3d Cir. 1992); *United States v. Toler*, 901 F.2d 399, 402 (4th Cir. 1990).

Section 3D1.2 permits grouping when: (a) the counts involve the same victim and the same act or transaction; (b) the counts involve the same victim and two or more acts connected by a common criminal objective or a common scheme; (c) one of the counts is treated as a specific offense characteristic related to another count; or (d) when the offense level is determined largely on the basis of the total amount of harm or loss. Subsection 3D1.2(d) lists a number of offenses, including tax offenses, which are to be included in the category of offenses that have the offense level determined by loss, and a list of offenses specifically excluded from the operation of that subsection. In other words, the section "divides offenses into three categories: those to which the section specifically applies; those to which it specifically does not apply; and those for which grouping may be appropriate on a case-by-case basis." *United States v. Gallo*, 927 F.2d 815, 823 (5th Cir. 1991). In victimless crimes, "the grouping decision must be based primarily upon the nature of the interest invaded by each offense." *Gallo* 927 F.2d at 824 (citing USSG §3D1.2(d), comment. (n.2)).

Thus, money laundering and counts involving the failure to file currency transaction reports can be grouped, and the appropriate offense level determined by the aggregated quantity of money involved in all the grouped counts. *United States v. Shin*, 953 F.2d 559, 562 (9th Cir. 1992), *cert.*

denied, 113 S. Ct. 2933 (1993). The Eleventh Circuit has suggested that grouping might be appropriate for counts involving both embezzlement and fraud. *United States v. Harper*, 972 F.2d 321, 322 (11th Cir. 1992).

Grouping is not appropriate under section 3D1.2 when the guidelines measure harm differently. *United States v. Taylor*, 984 F.2d 298, 303 (9th Cir. 1993) (holding that wire fraud and money laundering do not group); *United States v. Johnson*, 971 F.2d 562, 576 (10th Cir. 1992) (holding that, because wire fraud measures the harm based on the loss resulting from the fraud and money laundering measures harm on the basis of the value of the funds, the two crimes do not group). The Third Circuit has held that grouping is inappropriate in a case involving both fraud and tax evasion. *United States v. Astorri*, 923 F.2d 1052, 1056 (3d Cir.), *cert. denied*, 112 S. Ct. 444 (1991); *accord Seligsohn*, 981 F.2d at 1425. The Second Circuit has determined that "the laws prohibiting perjury and tax evasion protect wholly disparate interests and involve distinct harms to society." *United States v. Barone*, 913 F.2d 46, 50 (2d Cir. 1990). Thus, the two crimes cannot be grouped for sentencing purposes. *Barone*, 913 F.2d at 50.

At least one circuit has found that verdicts entered at different times can be grouped for sentencing purposes. See *United States v. Kaufman*, 951 F.2d 793 (7th Cir. 1992), *cert. denied*, 113 F.2d 2350 (1993). In *Kaufman*, the defendant was indicted on four counts of money laundering and one count of attempted money laundering. At trial, the jury acquitted the defendant of counts one and two, convicted on count five, and was unable to reach a verdict on counts three and four. The court declared a mistrial as to counts three and four, leaving them unresolved. The sentencing court sentenced on count five, and the defendant appealed. The appellate court found that count five could be grouped for sentencing with counts three and four, if necessary, when counts three and four were resolved. *Kaufman*, 951 F.2d at 796.

5.07 OBSTRUCTION OF JUSTICE

The guidelines require a two-level increase in the offense level when the court finds that a defendant "willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of his offense." USSG §3C1.1. Case law provides a variety of scenarios which justify an obstruction of justice enhancement. A defendant's failure to furnish a probation officer with information concerning the defendant's financial status when it was necessary to determine the defendant's ability to pay a fine or restitution is obstruction of justice. *United States v. Beard*, 913 F.2d 193, 199 (5th Cir. 1990). It is obstruction of justice for a defendant to tell a witness to lie. *United States v. Hollis*, 971 F.2d 1441, 1460 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1580 (1993). It is obstruction of justice to make false statements to investigating agents and to falsify records or to prepare a false document which is used as evidence at trial. *United States v. August*, 984 F.2d 705, 714 (6th Cir. 1992). Delaying trial by making false representations of a codefendant's health warrants the obstruction enhancement. *United States v. Morphey*, 909 F.2d 1143, 1146 (8th Cir. 1990).

The Second Circuit has held that backdating a promissory note warrants an obstruction of justice enhancement. *United States v. Coyne*, 4 F.3d 100, 114 (2d Cir. 1993). In *Coyne*, the defendant was convicted of numerous charges including mail fraud and bribery, but was acquitted of a tax evasion which charged him with not reporting \$30,000 which was reflected by a backdated note. The defendant argued that the jury must have concluded that the transaction was a loan and that he, therefore, did not obstruct the Internal Revenue Service investigation. The court found that the proof of the crime had to be supported beyond a reasonable doubt, but that the burden of proving obstruction of justice was by a preponderance of the evidence. Thus, the court "was free to find that the backdating was an intentional attempt to thwart the investigation of a bribe." *United States v. Coyne*, 4 F.3d at 114.

The Supreme Court has held that when a defendant perjures himself on the stand, the court is warranted in enhancing the defendant's offense level for obstruction of justice. *United States v.*

Dunnigan, 113 S. Ct. 1111, 1117 (1993). The trial court in so doing, however, must make findings on the record which encompass all of the factual predicates for a finding of perjury. *Dunnigan*, 113 S. Ct. at 1117. The Court indicated that perjury requires: (1) the giving of false testimony; (2) concerning a material matter; (3) with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory. *Dunnigan*, 113 S. Ct. at 1116. Compare *United States v. Rubio-Topete*, 999 F.2d 1334, 1341 (9th Cir. 1993) (rejecting two-level enhancement for obstruction of justice in absence of factual findings by the sentencing court encompassing all of the factual predicates necessary for a finding of perjury).

Some courts have rejected a two-level enhancement for obstruction of justice for untruthful statements which are not made under oath and do not mislead or impede an investigation. The Tenth Circuit found that statements made to IRS agents denying the existence of bank accounts or taxable income amounted to "nothing more than a denial of guilt or `an exculpatory no.'" *United States v. Urbanek*, 930 F.2d 1512, 1515 (10th Cir. 1991). Accord *United States v. Shriver*, 967 F.2d 572, 575 (11th Cir. 1992) (statements made to IRS inspector which do not significantly obstruct or impede investigation do not warrant enhancement).

Note, however, that this enhancement cannot be applied for behavior constituting contempt of court when the defendant has been convicted of contempt for his behavior unless significant further obstruction occurred. USSG §3C1.1, comment. (n.6); *United States v. Williams*, 922 F.2d 737, 739 (11th Cir.), *cert. denied*, 112 S. Ct. 258 (1991).

5.08 ACCEPTANCE OF RESPONSIBILITY

Section 3E1.1 allows the district court to reduce the offense level by two "[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct. . ." USSG §3E1.1(b).¹⁰ A defendant may receive this reduction in offense level whether he pleads guilty or proceeds to trial. *United States v. Mourning*, 914 F.2d 699, 705 (5th Cir. 1990). This reduction does not apply, however, to a defendant who denies the essential elements of the crime at trial. USSG §3E1.1, comment. (n.3). A defendant who enters a guilty plea is not entitled to an adjustment pursuant to 3E1.1 as a matter of right. USSG §3E1.1, comment. (n.3). The burden is on the defendant to demonstrate his acceptance of personal responsibility. *Mourning*, 914 F.2d at 705; *United States v. Lublin*, 981 F.2d 367, 370 (8th Cir. 1992). The guideline requires a showing of sincere contrition on the defendant's behalf in order to warrant such a reduction. *United States v. Beard*, 913 F.2d 193, 199 (5th Cir. 1990). The range of conduct upon which a court may base its decision varies in the different circuits.

The commentary suggests that voluntary payment of restitution prior to adjudication of guilt may be evidence of acceptance of responsibility. USSG §3E1.1, comment. (n.1(b)). No acceptance of responsibility is demonstrated, however, by defendants who agree to payment of restitution in order to avoid forfeiture. *United States v. Hollis*, 971 F.2d 1441, 1459 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1580 (1993).

One question that divided the courts prior to the November 1, 1992, amendments was whether a defendant had to accept responsibility for all of his relevant conduct or only for the behavior associated with the crime of conviction. Some courts held that to require a defendant to admit to behavior beyond the crime of conviction would require a defendant to incriminate himself in violation of his Fifth Amendment privilege.

Generally, courts which found Fifth Amendment implications based their decisions on a line of Supreme Court cases holding that the government "may not impose substantial penalties because [an individual] elects not to exercise his Fifth Amendment right not to give incriminating testimony against himself." *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977). Thus, according to these courts, a sentencing court could not condition the acceptance of responsibility reduction on admissions of conduct for which a defendant had not been convicted. *See, e.g., United States v. Perez-Franco*, 873 F.2d 455, 463 (1st Cir. 1989); *United States v. Oliveras*, 905 F.2d 623, 632 (2d Cir. 1990); *United States v. Frierson*, 945 F.2d 650, 659-60 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1515 (1992); *United States v. Piper*, 918 F.2d 839, 841 (9th Cir. 1990).

Other circuits held that section 3E1.1 required a defendant to accept responsibility for all of his relevant conduct. These circuits:

[A]void[ed] the impact of the Supreme Court's so-called "penalty cases" by distinguishing between a "denied benefit" and a "penalty."

These circuits hold that denial of the two-level reduction does not constitute a penalty and thus does not implicate the Fifth Amendment.

United States v. Clemons, 999 F.2d 154, 159 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 707 (1994). *See United States v. Frazier*, 971 F.2d 1076, 1084 (4th Cir. 1992), *cert denied*, 113 S. Ct. 1028 (1993); *United States v. White*, 869 F.2d 822, 826 (5th Cir.), *cert. denied*, 490 U.S. 1112 (1989); *United States v. Saunders*, 973 F.2d 1354, 1362 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1026 (1993); *United States v. Henry*, 883 F.2d 1010, 1011 (11th Cir. 1989).

The amendments which became effective November 1, 1992, clearly provide that "a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction" for acceptance of responsibility. USSG §3E1.1, comment. (n.1(a)). "However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility" *Id.* See *United States v. Hicks*, 978 F.2d 722, 726 (D.C. Cir. 1992).

5.09 DEPARTURES

5.09[1] *Departures for Aggravating or Mitigating Circumstances*

A guidelines sentence is mandatory, and departure is justified only as stated in 18 U.S.C. § 3553(b). The only circumstance justifying departure from the "mechanical dictates" of the guidelines is when the court finds that there exists an "aggravating or mitigating circumstance of a kind, or to a degree," which was not adequately taken into consideration by the Sentencing Commission. *Burns v. United States*, 111 S. Ct. 2182, 2184-85, (1991).

The court first determines the Guideline sentence and then considers whether there is an aggravating or mitigating circumstance. *United States v. Davern*, 970 F.2d 1490, 1493 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1289 (1993). The defendant bears the burden of proof to establish any factors which would potentially reduce the sentence. *United States v. Urrego-Linares*, 879 F.2d 1234, 1238 (4th Cir.), *cert. denied*, 439 U.S. 943 (1991). The sentencing court must state the specific reasons for the departure and the sentence imposed must be reasonable in light of the articulated reasons. *United States v. Mourning*, 914 F.2d 699, 707-8 (5th Cir. 1990). A court may satisfy the requirement to state specific reasons for the departure by adopting legally sufficient facts as set forth in a presentence report. *United States v. Dale*, 991 F.2d 819, 856-57 (D.C. Cir. 1993). *Cf. United States v. Charroux*, 3 F.3d 827, 836 (5th Cir. 1993).

Courts have suggested that gang or organized crime connections can provide an appropriate basis for upward departure. *United States v. Thomas*, 906 F.2d 323, 328 (7th Cir. 1990); *United States v. Cammisano*, 917 F.2d 1057, 1064 (8th Cir. 1990). Courts consistently have held that ordinary family responsibilities do not warrant downward departure. *United States v. Johnson*, 964 F.2d 124, 128 (2d Cir. 1992) (citing cases). However, extraordinary family circumstances have been accepted as a valid reason for departure. *Johnson*, 964 F.2d at 128. *But see United States v. Thomas*, 930 F.2d 526, 530 (7th Cir.), *cert. denied*, 112 S. Ct. 171 (1991). A court cannot make an upward departure because it finds the defendant, who was a judge and lawyer, violates a special duty to the community because of his position. *United States v. Barone*, 913 F.2d 46, 50 (2d Cir. 1990).

Rule 32, F.R.Crim.P., requires a district court to furnish reasonable notice to the parties of its intent to depart from the guidelines and to identify with specificity the ground on which it is contemplating a departure. *Burns v. United States*, 111 S. Ct. 2182, 2187 (1991).

5.09[2] *Departure Based on Substantial Assistance to Authorities*

Section 5K1.1 permits the sentencing court, upon motion by the government, to depart from the guidelines. The government motion must state that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense. The appropriate reduction shall be determined by the court for reasons stated, that may include the following considerations:

- (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;¹¹
- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant's assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
- (5) the timeliness of the defendant's assistance.

USSG §5K1.1. Substantial assistance is directed to the investigation and prosecution of persons other than the defendant, while acceptance of responsibility is directed to the defendant's own affirmative recognition of responsibility for his own conduct.

USSG §5K1.1, comment. (n.2).

The Supreme Court has held that "federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive," such as race or religion. *Wade v. United States*, 112 S. Ct. 1840, 1843-44 (1992). The Court also noted that a defendant must make a substantial threshold showing of improper motive to be entitled to discovery or an evidentiary hearing. *Wade*, 112 S. Ct. at 1844. A mere showing of assistance is not sufficient grounds for relief. *Wade*, 112 S. Ct. at 1844. The government is not obligated to move for departure merely because the defendant assisted in the prosecution of a codefendant. *United States v. Mesa-Rincon*, 911 F.2d 1433 (10th Cir. 1990).

5.10 *TAX DIVISION POLICY*

It has long been a priority of the Tax Division to pursue vigorous prosecution of a wide range of tax crimes to deter taxpayer fraud and to foster voluntary compliance. Consistent with this long-standing priority, the Tax Division has issued a number of statements concerning policy and procedures regarding pleas and sentencing, including the Sentencing Guidelines.

5.11 *PLEA AGREEMENTS*

5.11[1] *Plea Agreements and Major Count Policy for Offenses Committed Before November 1, 1987*

In cases involving offenses committed prior to November 1, 1987, the overwhelming percentage of all criminal tax prosecutions were disposed of by a plea of guilty. The transmittal letter forwarding the case from the Tax Division to the United States Attorney specifies the count(s) deemed to be the major count(s). In these cases, only a few of which remain, the U.S. Attorney's office, without prior approval of the Tax Division, is authorized to accept a plea of guilty with respect to the major count(s). USAM 6-4.310 (Major Count Policy).

In these cases, the designation by the Tax Division of a count as a major count is premised on the following considerations:

- a. Felony counts take priority over misdemeanor counts;
- b. Tax evasion counts (26 U.S.C. § 7201) usually take priority over other counts;
- c. Where a conspiracy (*e.g.* 18 U.S.C. § 371) and substantive tax counts are authorized, the circumstances of the case will determine whether the conspiracy or a substantive tax count is designated as the major count;
- d. As between counts under the same statute, the count involving the greatest financial detriment to the United States (*i.e.*, the greatest additional tax due and owing) will be considered the major count; and
- e. When there is little difference in financial detriment between counts under the same statute, the determining factor will be the relevant flagrancy of the offense.

USAM 6-4.310.

5.11[2] ***Plea Agreements and Major Count Policy for Offenses Committed After November 1, 1987***

As is true with tax offenses committed prior to November 1, 1987, the transmittal letter from the Tax Division to the United States Attorney's office for offenses committed after that date will designate one of the counts as the major count. Thereafter, the U.S. Attorney's office, without prior approval of the Tax Division, is authorized to accept a plea of guilty with respect to the major count. The only difference lies in the way in which the major count is selected.

On December 17, 1990, the Tax Division issued a "bluesheet" which sets forth the application of the Major Count Policy in Sentencing Guidelines Cases. USAM 6-4.311. The "bluesheet" coordinates the Major Count Policy with the Department of Justice's plea policy for Guideline cases as delineated in former Attorney General Thornburgh's Memorandum to Federal Prosecutors of March 13, 1989. The Department's plea policy provides that a federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct.¹² Thereafter, charges are not to be dismissed or dropped pursuant to a plea

bargain unless the prosecutor has a good faith doubt as to the government's ability to prove readily a charge for legal or evidentiary reasons. There are two exceptions to this policy. First, if the applicable Guideline range from which a sentence may be imposed would remain unaffected, readily provable charges may be dropped as part of the plea bargain. Second, federal prosecutors may drop readily provable charges with the specific approval of the United States Attorney or designated supervisory level official for reasons set forth in the file of the case. Attorney General Thornburgh's Memorandum to Federal Prosecutors of March 13, 1989, at page 3.

Under the Sentencing Guidelines, sentencing ranges in criminal tax cases are primarily determined by the amount of "tax loss." The relevant "tax loss" includes the tax loss caused by the offense or offenses of conviction, plus the tax loss from any other year that is part of the same course of conduct or common scheme or plan as the offense of conviction. USSG §§2T1.1(a), 1B1.3(a)(2), and 2T1.1, comment. (n.3). Thus, according to the "bluesheet" regarding application of the Tax Division's Major Count Policy in Sentencing Guideline cases, the following considerations apply in selecting the major count:

- a. In the majority of cases, where the tax offenses are all part of the same course of conduct or a common scheme, the Tax Division will designate a single Guideline year as the major count (even if there is a mix of Guideline and pre-Guideline year counts, because the tax loss from all years is taken into account in determining the tax loss of the offense to which a defendant pleads).
- b. Where all of the tax charges are not part of the same course of conduct or common scheme, the Tax Division may either designate as major counts one count from each group of unrelated counts or designate one count from one of the groups of unrelated counts as the major count and have the prosecutor obtain a stipulation from the defendant establishing the commission of the offenses in the other group. *See* USSG §1B1.2(c). Guideline year counts will take precedence over pre-Guideline year counts.
- c. Designation of more than a single year as the major count

may be required also where the computed Guideline sentencing range exceeds the maximum sentence that can be imposed under a single count.

- d. A pre-Guideline year count will be selected as the major count, in addition to a Guideline year count, only if it was not part of the same course of conduct or common scheme *and* there is a significant reason for taking a plea to that count, *e.g.*, when the amount involved in the unrelated pre-Guideline year count is substantially greater than the amount in any Guideline year count.
- e. In cases involving both tax and non-tax charges, the Tax Division may designate a less serious tax offense as the major count if (1) there is sufficient information to establish that it will not affect the applicable Guideline range *and* (2) there is adequate justification for a deviation from the usual policy.

USAM 6-4.310.

In the event that a defendant indicates in advance of indictment or the filing of an information that he intends to plead guilty to the major count, an indictment is still to be sought, or an information filed, which includes all counts authorized for prosecution. This procedure ensures that the public record contains all the offenses that were authorized. The government's statement of the factual basis for the prosecution, as required by Rule 11 of the Federal Rules of Criminal Procedure, will then include the full extent of defendant's conduct and intent. USAM 6-4.310. After a defendant's guilty plea to a major count has been accepted by the court and sentencing has occurred, the remaining counts of the information or indictment may be dismissed. USAM 6-4.310.

5.11[3] *Nolo Contendere Pleas*

Tax Division policy requires all government attorneys to oppose the acceptance of *nolo contendere* pleas. When pleading "*nolo*," the defendant may create the impression that the government has only a technically adequate case which he elects not to contest. A guilty plea is preferred because it strengthens the government position when the defendant contests a civil fraud penalty in an ancillary proceeding, and a *nolo* plea does not entitle the government to use the doctrine of collateral estoppel. A *nolo* plea may be unopposed by a federal prosecutor in only the most unusual case and *the Assistant Attorney General of the Tax Division must approve its acceptance*. USAM 6-4.320.

5.11[4] "*Alford*" Pleas

In the landmark case of *North Carolina v. Alford*, 400 U.S. 25 (1970), the Supreme Court upheld the validity of accepting a plea of guilty by a defendant who pleads guilty while maintaining his innocence. Despite such authority, U.S. government attorneys are to oppose the acceptance of "Alford" pleas because the entry of such pleas may create the appearance of prosecutorial overreaching. Again, only under the most unusual circumstances can a prosecutor agree to such a plea, and *the plea must be approved by the Assistant Attorney General, Tax Division*. USAM 6-4.330.

5.11[5] *Pleas by Corporations*

Charges against an individual defendant will not be dismissed on the basis of a plea of guilty by a corporate defendant unless there are special circumstances justifying the dismissal. USAM 9-2.146.

5.12 *TRANSFER FROM DISTRICT FOR PLEA AND SENTENCE*

Rule 20 of the Federal Rules of Criminal Procedure provides a procedure whereby a defendant who is arrested, held, or present in a district other than the district in which a case is pending against him can waive trial and enter a guilty plea or nolo plea in the district in which he is arrested, held, or present. Any proposed transfer must be approved by the United States Attorney for each district.

Some defendants have misused this provision as part of a plan to forum shop and have their cases transferred to what they believe to be a more lenient court. For this reason, it is requested that prior to consenting to any transfer under Rule 20 in a criminal tax case, United States Attorneys secure authorization from the Tax Division, which may have information as to the reason for the requested transfer that is not available to the United States Attorneys involved.

5.13 *SENTENCING*5.13[1] *Departures from the Guidelines*

As noted above, the sentencing court is required to impose a sentence within the range specified by the guidelines unless it finds an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into account by the Sentencing Commission in formulating the guidelines. Tax Division attorneys may recommend, without further approval, a departure, either upward or downward, based on any of the factors listed in section 5K2 of the guidelines. However, within the Tax Division, approval of the appropriate Section Chief is required for an attorney to seek either: (a) a downward departure under section 5K1.1 for substantial assistance to authorities; or (2) an upward or downward departure for any factor other than one of those set out in section 5K2. See Tax Division Memorandum, March 31, 1992, regarding "*Bluesheet*" Concerning *Plea Procedures* contained in Section 3.00 of this Manual. Prior to making such a recommendation, the Tax Division attorney must consult with the local U.S. Attorney's office to insure that the proposed departure is consistent with the policy of that office. Assistant United States Attorneys who are handling tax cases should abide, of course, by the procedures established in their offices for complying with the requirements of the February 7, 1993, "bluesheet," affecting USAM 9-27.451. Under no circumstances, however, will the government attorney in a tax case recommend that there be no period of incarceration. USAM 6-4.340.

5.13[2] *Costs of Prosecution*

The principal substantive criminal tax offenses (*i.e.*, 26 U.S.C. §§ 7201, 7203, 7206(1) and (2)) provide for the mandatory imposition of costs of prosecution upon conviction. Courts increasingly are recognizing that the imposition of costs in such criminal tax cases is mandatory and constitutional. *See, e.g., United States v. Saussy*, 802 F.2d 849 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987); *United States v. Fowler*, 794 F.2d 1446 (9th Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); *United States v. Chavez*, 627 F.2d 953 (9th Cir. 1980); *United States v. Palmer*, 809 F.2d 1504 (11th Cir. 1987).

The policy statement on costs of prosecution in section 5E1.5 of the guidelines states that "[c]osts of prosecution shall be imposed on a defendant as required by statute." The commentary to section 5E1.5 states that "[v]arious statutes *require* the court to impose the costs of prosecution" and identifies 26 U.S.C. §§ 7201, 7202, 7203, 7206, 7210, 7213, 7215, and 7216 as being among the statutes requiring the imposition of costs. USSG §5E1.5, comment. (backg'd.) (emphasis added). In addition, section 8E1.3 authorizes the court to impose the costs of prosecution on an organization. The Tax Division strongly recommends that attorneys for the government seek costs of prosecution in criminal tax cases. USAM 6-4.350.

5.13[3] *Appeal of Sentences*

Under prior practice, the sentence imposed by a district court judge was essentially unreviewable unless it was clearly outside the sentence authorized by statute. Section 3742 of Title 18, United States Code, now permits sentences imposed under the Federal Sentencing Guidelines to be appealed by both the defendant and the government under certain circumstances. The government may appeal a sentence in the following four situations:

- a. When the sentence is imposed in violation of law;
- b. When the sentence is imposed as a result of an incorrect application of the guidelines;
- c. When the sentence is less than the sentence specified in

the applicable guidelines range; or

- d. When the sentence is imposed for an offense for which there is no Sentencing Guideline and the sentence is plainly unreasonable.

18 U.S.C. § 3742(b)(1)-(4). Government appeal of a sentence is not authorized for a sentence within the correct sentencing Guideline or for a sentence above the guidelines even when there is an honest belief that the sentence is too low.

The government may file a notice of appeal in district court for review of an otherwise final sentence. However, any further actions require the approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General. *Department of Justice Memorandum of November 3, 1987, Interim Sentencing Advocacy and Case Settlement Policy Under New Sentencing Guidelines*, Stephen S. Trott, Associate Attorney General (hereinafter "*Trott Memorandum*").

Recommendations to the Solicitor General for government appeals of sentences on tax counts must be processed through the Tax Division, which should be notified immediately of any adverse sentencing decision. To assure consistent implementation of the guidelines, a government attorney in a tax case should notify the Tax Division of any "*significant* sentencing issue raised on appeal by a defendant that could pose a problem for the Department." *Trott Memorandum* (emphasis in original). The designated person to contact is the chief of the Criminal Appeals and Tax Enforcement Policy Section (CATEPS). The current telephone number is (202) 514-3011.

A notice of appeal must be filed within 30 days of the imposition of the sentence. Therefore, the government attorney who wishes to appeal an adverse sentencing decision should make the recommendation to the Tax Division along with accompanying documentation within seven days of the imposition of sentence. *Trott Memorandum*.

5.14 **RESOLUTION OF CIVIL LIABILITY DURING THE CRIMINAL CASE**

5.14[1] **As Part of a Plea Agreement**

Statutory authority exists for the Attorney General or his delegate to enter into agreements to compromise civil tax liability in cases referred to the Department of Justice. 26 U.S.C. § 7122(a). As a matter of longstanding policy, however, this authority is rarely exercised. USAM 4.360. The reason for this policy is to avoid the appearance that the criminal process is being used to aid in the collection of civil tax liabilities.

It is the Department's view that, in a criminal tax case, collection of the related civil liabilities, including fraud penalties, is a matter entirely separate from the criminal aspects of the case. The U.S. Attorney's Manual directs that "settlement of the civil liability [be] postponed until after the sentence has been imposed in the criminal case, except where the court chooses to defer sentence pending the outcome of such settlement." In this event, the IRS should be notified so that it can begin civil negotiations with the defendant. USAM 6-4.360.

The Tax Division may accept a plea agreement which includes certain civil admissions by the defendant:¹³

1. An admission by the defendant that he received enumerated amounts of unreported income or claimed enumerated amounts of illegal deductions or improper credits for years set forth in the plea agreement.
2. A stipulation by the defendant that he is liable for the fraud penalty imposed by the Code (formerly section 6653 and now section 6663) on the understatements of liability for the years involved.⁶
3. An agreement by the defendant that he or she will file, prior to the time of sentencing, initial or amended

⁶ Normally, this stipulation should be required in any case in which the charges are for attempted evasion of tax, as well as in any case in which the charges are for filing false tax returns which understate tax liability. It may be more difficult to justify the inclusion of such a stipulation in a failure to file case (26 U.S.C. § 7203), since proof of a tax liability is not an element of the government's proof and a conviction, therefore, would not collaterally estop the defendant from contesting the fraud penalty. Nevertheless, it is within the discretion of the prosecutor to insist upon such a stipulation in a failure to file case where there, in fact, has been an understatement of tax liability.

personal returns for the years subject to the above admissions, correctly reporting all previously unreported income and correcting all improper deductions and credits previously claimed, will, if requested, provide the Internal Revenue Service information regarding the years covered by the returns, and will pay at sentencing all additional taxes, penalties and interest which are due and owing. Such an agreement should also include a provision that the defendant agrees promptly to pay any additional amounts determined to be owing which result from computational errors. Finally, the agreement should include a provision that nothing in the agreement should be construed to foreclose the Internal Revenue Service from examining and making adjustments to the returns involved after they are filed.

4. An agreement by the defendant that he will not thereafter file any claims for refund of taxes, penalties, or interest for amounts attributable to the returns filed incident to the plea.

See Memorandum, United States Department of Justice, Tax Division, Civil Settlements in Plea Agreement, June 3, 1993.

5.14[2] *Payment of Taxes as Acceptance of Responsibility*

The Tax Division recognizes that the Federal Sentencing Guidelines encourage a defendant to initiate payment of his taxes during the criminal case. The guidelines provide for a two-level reduction of the base offense level if the defendant shows "acceptance of personal responsibility" for his conduct. USSG §3E1.1.

The Tax Division considers the defendant's payment of tax liability to be one factor in determining whether to recommend a reduction in offense level based upon the defendant's acceptance of responsibility. Other factors may include: (1) voluntary termination or withdrawal from criminal conduct or associations; (2) voluntary and truthful admissions to authorities; (3) voluntary surrender to authorities; (4) voluntary assistance to authorities in recovering the fruits of the offense; and (5) the timeliness of defendant's conduct in manifesting acceptance of

responsibility. *See* USSG §3E1.1, comment. (n.1).

The defendant should initiate the process of resolving his tax liability during the pendency of the criminal case. The Tax Division will consider favorably the filing of a truthful and complete amended tax return accompanied by the payment of the tax due in determining whether to recommend the "acceptance of responsibility" sentence reduction. J. Bruton, Federal Tax Enforcement Tax Division Policies and Priorities, American Bar Association National Institute, White Collar Crime, (1993).

5.15 *THE 1993 SENTENCING GUIDELINE AMENDMENTS*

The 1993 Guideline amendments, effective November 1, 1993, demonstrate an intent to increase the base offense level for tax loss and to clarify the meaning of the term "tax loss."

The changes will apply to crimes committed on or after November 1, 1993, and to offenses beginning before that date and continuing after that date. Because the penalties may be harsher than in prior years, the *ex post facto* prohibition might prevent use of the changes for sentencing for conduct occurring in years prior to the changes. Thus, prosecutors may continue to work with older editions of the guidelines for some years to come.

Because the November 1, 1993, changes have been in effect for only a few months, there is little, if any, case law interpreting them. Undoubtedly, problems and questions will arise as the new guidelines are applied. To insure a consistent approach, prosecutors are encouraged to contact the Criminal Appeals and Tax Enforcement Policy Section of the Tax Division at (202) 514-3011 with any questions.

5.15[1] The Amendment of the Sentencing Table

When the guidelines initially were promulgated, the Sentencing Table's Zone A, Criminal History Category I, included offense levels one through six, inclusive. A large number of criminal tax cases fell in Zone A. In addition, most defendants convicted of a legal source income tax crime have no prior criminal history and, thus, are in Criminal History Category I. Thus, a large number of defendants convicted of tax crimes were eligible to receive a sentence of probation.

In 1992, in an effort to expand alternatives to incarceration in response to judicial complaints and prison overcrowding, the Commission amended the sentencing table and expanded Zone A to include two additional offense levels. Accordingly, the current sentencing table's Zone A, Criminal History Category I, includes offense levels one through eight. Each of these offense levels provides a sentencing range of from zero to six months incarceration and permits the courts to impose a sentence of probation. When the 1992 amendment to the Sentencing Table was made, no corresponding adjustment was made to the offense levels of the Tax Table of section 2T4.1. As a result, the number of those convicted of tax crimes who could receive a sentence of probation increased significantly.

In fashioning the 1993 tax amendments to the guidelines, the Commission had as its stated purpose "to provide increased deterrence for tax offenses." USSG App. C, Amend. 491, p.338. The proposed amendments, in essence, increased the Tax Tables by two levels throughout. This has the effect of (1) increasing the average period of incarceration by six months,¹⁴ and (2) reducing the likelihood that a tax crime defendant will receive an alternative type of incarceration.

5.15[2] *Amendment Regarding Tax Loss*

Under the guidelines as they existed prior to November 1, 1993, the determination of "tax loss" was dependent upon the definition in the particular offense guideline. For example, tax loss was defined for tax evasion in section 2T1.1 and for the filing of a false return in section 2T1.3. The post-November 1, 1993, guidelines consolidate several tax guidelines (sections 2T1.1, 2T1.2, 2T1.3 and 2T1.5) and adopt a uniform definition of "tax loss." The stated reason for this amendment is to eliminate "the anomaly of using actual tax loss in some cases and an amount that differs from actual tax loss in others." USSG App. C, Amend. 491, p.338. Section 2T1.1 creates a uniform definition of tax loss and applies to tax evasion, willful failure to file returns, supply information or pay a tax, and to fraudulent or false returns, statements, or other documents.

The new section 2T1.1 guideline gives special instructions which define the focus for calculating "tax loss" for attempted income tax evasion and filing false returns as "the total amount of the loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed)." USSG §2T1.1(c)(1). Notes then follow which create "presumptions" a court is to use in calculating "tax loss" in various situations. *See* USSG §2T1.1(c) Notes (A)-(C). *See also* USSG §2T1.1, comment. (n.1). The new section 2T1.1 guideline also defines "tax loss" for failure to file offenses (USSG §2T1.1(c)(2)), failure to pay offenses (USSG §2T1.1(c)(3)), and offenses involving improperly claiming a deduction (USSG §2T1.1(c)(4)). The commentary to USSG §2T1.1 provides that:

In determining the tax loss attributable to the offense, the court should use as many methods as set forth in subsection (c) and this commentary as are necessary given the circumstances of the particular case. If none of the methods of determining the tax loss set forth fit the circumstance of the particular case, the court should use any method of determining the tax loss that appears appropriate to reasonably calculate the loss that would have resulted had the offense been successfully completed.

USSG §2T1.1, comment. (n.1). The "presumptions" set out in §2T1.1(c) for calculating "tax loss" are to be used "unless the government or defense provides sufficient information for a more

accurate assessment of tax loss." USSG §2T1.1, comment. (n.1).¹⁵

5.15[3] *Other Amendments to the Tax Guidelines*

5.15[3][a] *Tax Loss For Individual and Corporate Liabilities*

An additional new Application Note to section 2T1.1 states:

If the offense involves both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together.

USSG §2T1.1, comment. (n.7). This amendment to the Application Notes is most likely a clarification of existing law rather than a substantive change. See *United States v. Harvey*, 996 F.2d 919, 920 (7th Cir. 1993).

5.15[3][b] *Tax Protestors*

The Commentary to section 2T1.9 makes clear that some acts by tax protestors may warrant an enhancement under the specific offense characteristic provided in section 2T1.9(b)(2).

Subsection (b)(2) provides an enhancement where the conduct was intended to encourage persons, other than the participants directly involved in the offense, to violate the tax laws (e.g., an offense involving a "tax protest" group that encourages persons to violate the tax laws, or an offense involving the marketing of fraudulent tax shelters or schemes).

Thus, conspiracies, including tax protest groups, which commit acts designed to encourage others to violate the tax laws will receive a two-level sentencing increase.

5.15[3][c] *Income from Criminal Activity*

Section 2T1.1(b)(1) provides for a two-level enhancement "[i]f the defendant failed to report or to correctly identify the source of income exceeding \$10,000 in any year from criminal activity."

Prior to the amendments of November 1, 1993, "criminal activity" was defined as "any conduct constituting a criminal offense under federal, state or local law." The commentary to section 2T1.1 now provides, however, that "'criminal activity' means any conduct constituting a criminal offense

under federal, state, local, or foreign law." USSG §2T1.1, comment. (n.3). Presumably, this amendment was in response to the Ninth Circuit's opinion in *United States v. Ford*, 989 F.2d 347 (9th Cir. 1993), holding that a court could not increase a defendant's base offense level pursuant to section 2T1.2(b)(1) for failure to report income derived from criminal activity in Canada.

1.. To determine which version of a particular Guideline was effective on a specific date, refer to the "Historical Note" at the end of the applicable Guideline. It will state the effective date of that Guideline and give reference to earlier versions which are reprinted in Appendix C of the Sentencing Guidelines.

2.. See Section 5.11[2], *infra*.

3.. Major changes to the definition of "tax loss" went into effect on November 1, 1993. See Section 5.15, *infra*. Because those changes are so recent, there is little case law applying the new guidelines. Consequently, most of the ensuing discussion deals with the guidelines as they existed prior to the November 1, 1993, amendments. In many cases, the guidelines that antedate November 1, 1993, will be the ones applied in any event because of *ex post facto* considerations.

4.. See n.3, *supra*.

5.. *But see* n.3, *supra*.

6.. *But see* n.3, *supra*.

7.. *But see* n.3, *supra*.

8.. See Section 17.09 of this Manual.

9.. *But see* n.3, *supra*.

10.. Effective November 1, 1992, the guidelines were amended to permit the sentencing court to reduce the offense level by three levels if two conditions are present: (a) the offense level is 16 or greater; and (b) the defendant has assisted authorities in the investigation or prosecution of his own misconduct. USSG §3E1.1(b).

11.. In making any evaluation on whether to make a downward departure, the court considers "the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered." USSG § 5K1.1. Thus, when the defendant's assistance in an investigation became almost useless when the target of the investigation died, the court was within its discretion to consider that fact in determining the extent of any departure. *United States v. Spiropoulos*, 976 F.2d 155, 162 (3d Cir. 1992).

12.. On October 12, 1993, Attorney General Reno issued a "bluesheet" intended to provide guidance with respect to 9-27.130; 9-27.140; 9-27.300 and 9-27.400 concerning Principles of Federal Prosecution. The "bluesheet" informs prosecutors that:

[I]n determining the most serious offense that is consistent with the nature of the defendant's conduct . . . it is appropriate [to consider] such factors as the sentencing

guideline range yielded by the charge, whether the penalty yielded by such sentencing range (or potential mandatory minimum charge, if applicable) is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation. *Note that these factors may also be considered by the attorney for the government when entering into plea agreements.*

Attorney General Reno, Memorandum dated October 12, 1993, affecting USAM § 9-27.000 regarding Principles of Federal Prosecution (emphasis added).

13.. Although it is not mandatory, the Tax Division strongly urges that any plea agreement in a tax case include these admissions and agreements.

14.. For example, a tax loss of more than \$10,000 in the Tax Table in effect prior to November 1, 1993, is a level 9 with a sentencing range of 4-10 months. Under the Tax Table which went into effect on November 1, 1993, a tax loss of over \$8,000 but less than \$13,500 is a level 10 with a sentencing range of 6-12 months.

15.. It is the position of the Tax Division that the defendant should not be permitted to rely on this language to support the introduction of information tending to show that there was no actual tax loss. "Tax loss" is a term of art in the guidelines and the term should not be used interchangeably in one provision to mean both actual tax loss and some other amount. In other words, the language "unless a more accurate determination of the tax loss can be made" (*see* USSG § 2T1.1(c), Note (a)) does not mean the defendant can introduce evidence to show that there was no actual tax loss, but only that information can be provided which establishes that the calculated amount was not the amount that was "the object of the offense." For example, a defendant should not be entitled to come in and show that he had deductions which he forgot to claim.