No. 07-1273

In the Supreme Court of the United States

JAMES DOMINIC DELFINO
AND JEANIENE ANN DELFINO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in calculating the "tax loss" for purposes of determining a defendant's base offense level for tax evasion under United States Sentencing Guidelines § 2T1.1(c)(1), a district court should consider deductions and credits that the defendant could have claimed.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 510 F.3d 468.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2007. A petition for rehearing was denied on January 15, 2008 (Pet. App. 14). The petition for a writ of certiorari was filed on April 7, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted on two counts each of attempting to evade the payment of income tax, in violation of 26 U.S.C. 7201; one count each of conspiring to defraud the United States, in violation of 18 U.S.C. 371; and one count each of mail fraud, in violation of 18 U.S.C. 1341. Petitioner James Delfino was sentenced to 78 months of imprisonment, to be followed by three years of supervised release; petitioner Jeaniene Delfino was sentenced to 63 months of imprisonment, also to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-13.

1. Petitioners owned and operated several computer consulting firms, from which they earned millions of dollars. From 1993 to 2004, however, petitioners failed to file income tax returns or pay any income tax. Instead, they placed their income in various trusts, which likewise failed to file income tax returns or pay any income tax. During this period, petitioners made explicit and implicit representations that they were in compliance with the tax laws. Petitioners' conduct was uncovered during an audit by the Internal Revenue Service (IRS). Because petitioners refused to cooperate with the IRS during the audit, they provided no support for any deductions or credits that they could have claimed during certain tax years. The IRS accordingly assessed tax on petitioners' total income for those years, without making any allowance for potential deductions or credits. Pet. App. 3; Gov't C.A. Br. 3-7, 25.

2. On May 17, 2005, a federal grand jury in the Eastern District of Virginia returned a superseding indictment charging petitioners with two counts each of attempting to evade the payment of income tax, in violation of 26 U.S.C. 7201; one count each of conspiring to defraud the United States, in violation of 18 U.S.C. 371; and one count each of mail fraud, in violation of 18

U.S.C. 1341. At trial, petitioners' primary defense was that they had relied in good faith on the advice of a self-described tax consultant, who had told them that they could avoid income tax by placing their income in trusts. A jury rejected petitioners' good-faith defense and found them guilty on all four counts. Pet. App. 2-4.

3. For purposes of the United States Sentencing Guidelines (Guidelines), the base offense level for petitioners' offenses was determined by Guidelines § 2T1.1, which applies to offenses such as tax evasion or failing to file a tax return. Under that Guideline, the base offense level depends on the amount of the "tax loss" resulting from the defendant's conduct. In the presentence report (PSR), the Probation Office determined that the relevant "tax loss" was slightly over $4.7 million, taking into account the assessed amounts for the relevant tax years (and penalties and interest accrued as of the date of the indictment), and that the base offense level for each petitioner was 24. Based on a total offense level of 26 and a criminal history category of I, each petitioner's Guidelines sentencing range was 63 to 78 months of imprisonment. C.A. App. 544; Gov't C.A. Br. 25-26, 28.

At sentencing, petitioners contended that the Probation Office erroneously calculated the relevant "tax loss" because it failed to take into account deductions and credits to which they would have been entitled if they had not engaged in tax evasion. If the Probation Office had considered those deductions and credits, according to petitioners, the relevant "tax loss" would have been between $400,000 and $1 million, and the base offense level would have been 20 (resulting in a sentencing range of 41 to 51 months). Gov't C.A. Br. 8, 28. The district court rejected petitioners' contention. C.A. App. 518-519, 523. The court ultimately sentenced James

Delfino to 78 months of imprisonment (the top of the applicable Guidelines range) and Jeaniene Delfino to 63 months of imprisonment (the bottom of the Guidelines range); it also sentenced each petitioner to three years of supervised release. *Id.* at 524, 526, 530, 538.

4. The court of appeals affirmed. Pet. App. 1-13. As is relevant here, the court of appeals, like the district court, rejected petitioners' contention that, for purposes of Guidelines § 2T1.1, the relevant "tax loss" should take into account deductions and credits to which they would have been entitled if they had not engaged in tax evasion. Pet. App. 8-13.

a. The court of appeals first held that its earlier decision in *United States* v. *Schmidt*, 935 F.2d 1440 (4th Cir. 1991), which had held that "tax loss" should take into account deductions and credits, was "no longer binding" because it involved the interpretation of an earlier version of Guidelines § 2T1.1 (which defined "tax loss," in relevant part, as "the total amount of tax that the taxpayer evaded or attempted to evade," rather than "the total amount of the loss that was the object of the offense"). Pet. App. 9-10. The court explained that, by referring to "the object of the offense," the current version of Guidelines § 2T1.1(c)(1) "means the loss that would have resulted had [the] defendant been successful in his scheme to evade payment of tax." Pet. App. 10. "[I]f [petitioners'] scheme had succeeded," the court continued, "the Government would have been deprived of the tax on the amount by which they underreported (or failed to report) their taxable income." *Ibid.* "This unpaid tax," the court concluded, "represents the intended loss to the Government." *Ibid.*

b. The court of appeals then rejected petitioners' reliance on Guidelines § 2T1.1(c)(2)(A), which defines "tax loss" as "the amount of tax that the taxpayer owed and did not pay" (and specifies, in a note, that the tax loss "shall be treated as equal to 20% of the gross income * * * unless a more accurate determination of the tax loss can be made"). Pet. App. 11-12. As a preliminary matter, the court noted that the government had argued that Guidelines § 2T1.1(c)(2)(A) was inapposite because it applied only to offenses "involv[ing] failure to file a tax return" (whereas Guidelines § 2T1.1(c)(1) applied to offenses "involv[ing] tax evasion or a fraudulent or false return"). Pet. App. 11 & n.1. The court did not resolve that issue, however, because it held that the operative language from the note to Guidelines § 2T1.1(c)(2)(A) allowed a defendant to argue only for the application of a different tax *rate* from the presumptive 20% rate, rather than for the consideration of deductions or credits. Pet. App. 12. The court noted that petitioners "chose not to file their income tax returns" and "also chose not to cooperate with the initial IRS audit, at which time they could have claimed deductions to which they were entitled." *Ibid.* "By doing so," the court reasoned, "they forfeited the opportunity to claim these deductions." *Ibid.* The court of appeals explained that, "[w]ere the district court now to attempt to reconstruct [petitioners'] income tax returns *post hoc*, it would be forced to speculate as to what deductions they would have claimed and what deductions would have been allowed." *Ibid.* The court of appeals concluded that "[t]his would place the court in a position of considering the many hypothetical ways that [petitioners] could have completed their tax returns." *Ibid.* (internal quotation marks and citation omitted).

5. The court of appeals denied a petition for panel rehearing and rehearing en banc without recorded dissent. Pet. App. 14.

ARGUMENT

Petitioners renew their contention (Pet. 19-31) that, for purposes of United States Sentencing Guidelines § 2T1.1, the relevant "tax loss" should take into account deductions and credits to which they would have been entitled if they had not engaged in tax evasion. That contention lacks merit and does not warrant further review.

1. This Court ordinarily does not review decisions interpreting the Guidelines, because the United States Sentencing Commission (Commission) can amend the Guidelines to eliminate any conflict or to correct an error. See *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991). The Commission is charged by Congress with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Id.* at 348; see *United States* v. *Booker*, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify the Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."). Review by this Court of Guidelines decisions is especially unwarranted in light of the Court's decision in *Booker*, which rendered the Guidelines advisory only. See *id.* at 243.

The evolution of Guidelines § 2T1.1 illustrates why this Court refrains from granting review to interpret particular guidelines, because the Commission has shown its willingness to revisit the provision's definition of "tax loss." As the court of appeals noted (Pet. App. 9-10), the Commission amended Guidelines § 2T1.1 in 1993 for the specific purpose of "adopting a uniform definition of tax loss." Guidelines App. C, Amend. 491 (Nov. 1, 1993). In the event that a genuine conflict were to arise concerning the meaning of the current version of Guidelines § 2T1.1, therefore, the Commission could reasonably be expected to resolve such a conflict by amending the Guideline.

2. a. In any event, the court of appeals correctly held that, for purposes of Guidelines § 2T1.1(c)(1), the relevant "tax loss" need not take into account deductions and credits that a defendant could have claimed if the defendant had not engaged in tax evasion. Guidelines § 2T1.1(c)(1) defines "tax loss," for offenses "involv[ing] tax evasion or a fraudulent or false return," as "the total amount of loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed)." As the court of appeals explained, that definition looks to the attempted or intended loss to the government, rather than the amount of tax that the defendant would actually have paid if he had not engaged in tax evasion. Pet. App. 10. A definition of "tax loss" that took into account potential deductions and credits "would insert subjectivity into the calculation" by "requir[ing] [a sentencing court] to recreate a 'perfect' tax return, taking into account all the legitimate unclaimed deductions, which would undoubtedly engender a great deal of dispute between the parties over which deductions were legitimate and which were not." *United States* v. *Chavin*, 316 F.3d 666, 678 (7th Cir. 2002); accord *United States* v. *Spencer*, 178 F.3d 1365, 1368 (10th Cir. 1999); cf. Guidelines § 2T1.1, comment. (n.1) (requiring a sentencing court, in calcu-

lating "tax loss," "simply [to] make a reasonable estimate based on the available facts"). And it would effectively reward defendants such as petitioners, who refused to cooperate with the IRS during the audit of their taxes (and thus provided no support for any deductions or credits that they could have claimed), with a second chance to minimize the taxes they never paid. See Gov't C.A. Br. 25.

b. In support of a contrary interpretation of Guidelines § 2T1.1(c)(1), petitioners seemingly rely (Pet. 27-28) on the notes to that provision, which provide that the "tax loss" should be calculated using certain formulas "unless a more accurate determination of the tax loss can be made." See Guidelines § 2T1.1(c)(1) nn.(A)-(C). Those notes, however, are applicable only to specific types of offenses: *i.e.*, offenses in which the defendant filed a tax return, but either underreported his income or improperly claimed a deduction or credit. None of those notes applies here, because petitioners' offense involved a scheme to evade taxation by, *inter alia*, failing to file tax returns altogether. Petitioners' reliance on those notes is therefore inapposite.

Even as to offenses that are covered by the notes to Guidelines § 2T1.1(c)(1), the relevant language of the notes does not support the conclusion that, in calculating "tax loss," a sentencing court should take into account deductions and credits that the defendant could have claimed. Those notes specify a presumptive tax *rate* that should be applied in calculating the "tax loss" for those offenses. See, *e.g.*, Guidelines § 2T1.1(c)(1) n.(A) (providing, for offenses involving the underreporting of income, that "the tax loss shall be treated as equal to 28% of the unreported gross income * * * unless a more accurate determination of the tax loss can be made"). As the court of appeals noted, the language of the notes concerning "a more accurate determination" merely permits a sentencing court to apply a different tax rate from the presumptive rate; it does not require a court to consider deductions or credits that the defendant could have claimed. Pet. App. 12; accord *Chavin*, 316 F.3d at 679; *Spencer*, 178 F.3d at 1368. Even if petitioners' offense was covered by the notes to Guidelines § 2T1.1(c)(1), therefore, petitioners' reliance on those notes would be unavailing.

Petitioners contend that the Second Circuit has relied on the relevant language of the notes to hold that a sentencing court should take into account deductions and credits that the defendant could have claimed. See Pet. 27-28 (citing *United States* v. *Martinez-Rios*, 143 F.3d 662 (1998), and *United States* v. *Gordon*, 291 F.3d 181 (2002), cert. denied, 537 U.S. 1114 (2003)). Neither of the cases identified by petitioners, however, in fact so holds. As petitioners concede (Pet. 24), the Second Circuit's discussion of the issue in *Martinez-Rios* constituted dictum. In *Martinez-Rios*, the Second Circuit, relying on the language of the notes, stated that the current version of Guidelines § 2T1.1(c)(1) "giv[es] the defendant the benefit of legitimate but unclaimed deductions." 143 F.3d at 671. Ultimately, however, the court applied a preexisting version of that Guideline, on the ground that the preexisting version "was in effect at the time of the commission of the last overt act in furtherance of defendants' tax evasion conspiracy" (and was "generally more favorable" to defendants because it prescribed lower offense levels). *Id.* at 670. The court therefore did "not tak[e] into account legitimate but unclaimed deductions for which the defendants may have offered proof." *Id.* at 671.

In *Gordon*, the Second Circuit, citing its "dicta" in *Martinez-Rios*, similarly stated that a sentencing court should "consider any potential unclaimed deductions in its sentencing analysis." 291 F.3d at 187. That statement, however, also constituted dictum, because the court ultimately determined that the defendant had failed to provide sufficient proof to establish that he was entitled to any unclaimed deduction. *Id.* at 187-188. And even if that statement were not dictum, any resulting conflict concerning the interpretation of the notes to Guidelines § 2T1.1(c)(1) would be inapposite (in light of the inapplicability of those notes here) and, consistent with this Court's ordinary practice in cases involving the interpretation of the Guidelines, would not warrant further review.

c. Finally, petitioners contend (Pet. 23-24) that this case is governed not by Guidelines § 2T1.1(c)(1), but rather by Guidelines § 2T1.1(c)(2), which defines "tax loss" as "the amount of tax that the taxpayer owed and did not pay" (rather than the attempted or intended loss to the government). Guidelines § 2T1.1(c)(2), however, applies only to offenses "involv[ing] failure to file a tax return": *e.g.*, the willful failure to file a tax return, in violation of 26 U.S.C. 7203. Petitioners, by contrast, were convicted of tax evasion, in violation of 26 U.S.C. 7201. Offenses involving tax evasion are unambiguously governed by Guidelines § 2T1.1(c)(1), and petitioners cite no authority applying Guidelines § 2T1.1(c)(2) in similar circumstances. Petitioners' reliance on Guidelines § 2T1.1(c)(2) is therefore unavailing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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