

[Criminal Tax Manual](#)[prev](#) • [next](#) • [help](#)

## 5.00 PLEAS AND SENTENCING: TAX DIVISION POLICY AND GUIDELINES

### Updated July 2001

[Notice regarding significant tax-related amendments to Sentencing Guidelines, effective November 1, 2001](#)

#### [5.01](#) GENERALLY

#### [5.02](#) GENERAL APPLICATION PRINCIPLES

[5.02\[1\]](#) Select the Appropriate Guidelines Manual  
[5.02\[2\]](#) Guideline Calculation

#### [5.03](#) CALCULATING THE BASE OFFENSE LEVEL IN TAX CASES

##### [5.03\[1\]](#) The Base Offense Level

[5.03\[1\]\[a\]](#) Section 7201  
[5.03\[1\]\[b\]](#) Section 7203  
[5.03\[1\]\[c\]](#) Section 7206(1)  
[5.03\[1\]\[d\]](#) Section 7206(2)  
[5.03\[1\]\[e\]](#) Section 7212(a)  
[5.03\[1\]\[f\]](#) Sections 286 and 287  
[5.03\[1\]\[g\]](#) Section 371

##### [5.03\[2\]](#) Specific Offense Characteristics

[5.03\[2\]\[a\]](#) Illegal Source Income  
[5.03\[2\]\[b\]](#) Sophisticated Concealment  
[5.03\[2\]\[c\]](#) Substantial Portion of Income Derived From Criminal Scheme  
[5.03\[2\]\[d\]](#) Business of Preparing or Assisting in Preparation of Tax Returns  
[5.03\[2\]\[e\]](#) Planned or Threatened Use of Violence  
[5.03\[2\]\[f\]](#) Encouragement of Others to Violate Tax Code

#### [5.04](#) RELEVANT CONDUCT

#### [5.05](#) ROLE IN THE OFFENSE

[5.05\[1\]](#) Aggravating Role in the Offense  
[5.05\[2\]](#) Mitigating Role in the Offense  
[5.05\[3\]](#) Abuse of Position of Trust or Use of a Special Skill

#### [5.06](#) OBSTRUCTION OF JUSTICE

#### [5.07](#) GROUPING

#### [5.08](#) ACCEPTANCE OF RESPONSIBILITY

[5.08\[1\]](#) Acceptance of Responsibility: In General  
[5.08\[2\]](#) Timely Government Assistance

#### [5.09](#) DEPARTURES

[5.09\[1\]](#) Departures for Aggravating or Mitigating Circumstances  
[5.09\[2\]](#) Departure Based on Substantial Assistance to Authorities

#### [5.10](#) WAIVER OF APPEAL OF SENTENCE IN PLEA AGREEMENTS

#### [5.11](#) TAX DIVISION POLICY

#### [5.12](#) PLEA AGREEMENTS

[5.12\[1\]](#) Plea Agreements and Major Count Policy for Offenses Committed Before November 1, 1987  
[5.12\[2\]](#) Plea Agreements and Major Count Policy for Offenses Committed After November 1, 1987  
[5.12\[3\]](#) Nolo Contendere Pleas.

[5.12\[4\]](#) Alford Pleas

[5.12\[5\]](#) Statements by Government Counsel at Sentencing; Agreeing to Probation

[5.12\[6\]](#) Compromise of Criminal Liability/Civil Settlement

### [5.13](#) TRANSFER FROM DISTRICT FOR PLEA AND SENTENCE

### [5.14](#) INTERSTATE AGREEMENT ON DETAINERS

### [5.15](#) SENTENCING POLICIES

[5.15\[1\]](#) Departures from the Guidelines

[5.15\[2\]](#) Costs of Prosecution

[5.15\[3\]](#) Government Appeal of Sentences

### [5.16](#) RESOLUTION OF CIVIL LIABILITY DURING THE CRIMINAL CASE

[5.16\[1\]](#) As Part of a Plea Agreement

[5.16\[2\]](#) Payment of Taxes as Acceptance of Responsibility

**N.B.** On May 1, 2001, the United States Sentencing Commission transmitted to Congress, as part of its Economic Crime Package, a series of enacted amendments to the United States Sentencing Guidelines Manual that will have a profound impact on sentencing in criminal tax and other white collar cases. Included in this Economic Crime Package are amendments consolidating the theft, property destruction and fraud guidelines into a new guideline, USSG § 2B1.1 (Theft, Property Destruction and Fraud) and providing a new loss table for the consolidated guideline and a new tax loss table. These amendments become effective on November 1, 2001, absent prior, contrary congressional action.

With respect to criminal tax sentencing, the amendments: (1) provide a new tax table (USSG § 2T4.1) with significantly higher offense levels at both the lower and upper ends of the table; (2) conform the "sophisticated concealment" specific offense characteristic of the tax guidelines (USSG §§ 2T1.1(b)(2), 2T1.4(b)(2)) with the "sophisticated means" enhancement of the fraud (Part F) guidelines, including a floor offense level of 12; and (3) address several issues related to the determination of tax loss. The changes to the determination of "tax loss" include a new special instruction at USSG § 2T1.1(c)(1)(D) to resolve the so-called "Harvey/Cseplo" circuit conflict in favor of the Cseplo position regarding the determination of tax loss in a case in which the defendant under-reports income on both individual and corporate tax returns. The clarifying change provides that, in these circumstances, the tax loss is the aggregate tax loss from the offenses taken together. The Commission's resolution of the conflict reflects its conclusion that, in cases of corporate diversion, the Cseplo method more accurately reflects the seriousness of the total harm caused by these offenses.

The November 1, 2001 amendments also include new language to application note 1 to USSG § 2T1.1 providing an exception to the general rule excluding interest and penalties from the definition of "tax loss." In willful evasion of payment cases under 26 U.S.C. § 7201 and willful failure to pay cases under 26 U.S.C. § 7203 only, interest and penalties will now specifically be included in the definition of "tax loss." The Commission acknowledges that the nature of these cases is such that the interest and penalties often greatly exceed the assessed tax amount constituting the bulk of the harm associated with these offenses.

## 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. 1993) (citing cases); *United States v. Gaudet*, 966 F.2d 959, 961-62 (5th Cir. 1992).

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*, 503 U.S. 193, 200-01 (1992). The Supreme Court 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*, 508 U.S. 36, 38 (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." *United States v. Fitzgerald*, 232 F.3d 315, 318 (2d Cir. 2000); *United States v. Zagari*, 111 F.3d 307, 323 (2d Cir. 1997); *See United States v. Bailey*, 123 F.3d 1381, 1403-1406 (11th Cir. 1997). 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).<sup>[FN1]</sup> *Fitzgerald*, 232 F.3d at 318-19; *Zagari*, 111 F.3d at 323; *United States v. Nelson*, 36 F.3d 1001, 1003 (10th Cir. 1994). Thus, if the sentencing guideline in effect at the time the offense was committed is more favorable to the defendant than the guideline in effect 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). Generally, for *ex post facto* purposes, the completion date of the offense controls the version of the Sentencing Guidelines to be applied. USSG §1.1.11, comment (n.2); *Bailey*, 123 F.3d at 1406; *Zagari*, 111 F.3d at 324; *United States v. Cooper*, 35 F.3d 1248, 1251 (8th Cir. 1994), *vacated*, 514 U.S. 1094 (1995), *reinstated*, 63 F.3d 761 (8th Cir. 1995). When a revised edition of the guidelines is applied to offenses that predate and postdate the revision, the Fourth Circuit has determined that such use does not violate the *ex post facto* clause. *United States v. Lewis*, 235 F.3d 215, 217-18 (4th Cir. 2000), petition for cert. filed 69 USLW 3702 (Apr 17, 2001)(No. 00-1605). *See also United States v. Sullivan*, 2001 WL 777000, \*2-3 (10th Cir. July 11, 2001).

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). This rule provides that a court cannot pick and choose or apply guidelines sections piecemeal. See USSG §§1B1.11(b)(2) and 1B1.11, comment. (backg'd).

*Fitzgerald*, 232 F.3d at 319; *United States v. Keller*, 58 F.3d 884, 890 (2d Cir. 1995) ("A version of the sentencing guidelines is to be applied in its entirety. A sentencing court has no authority to pick and choose, taking one provision from an earlier version of the guidelines and another from a later version."); *Nelson*, 36 F.3d at 1003-04; *United States v. Springer*, 28 F.3d 236, 237 (1st Cir. 1994); *United States v. Lance*, 23 F.3d 343, 344 (11th Cir. 1994). However, some courts have disapproved of the one book rule. See *United States v. Ortland*, 109 F.3d 539, 546 (9th Cir. 1997); *United States v. Seligsohn*, 981 F.2d 1418, 1424 (3d Cir. 1992).

When a court applies an earlier edition of the guidelines Manual, the court also must apply subsequent amendments to the extent that such amendments represent merely clarification rather than substantive changes. USSG §1B1.11(b)(2); *United States v. Isabel*, 980 F.2d 60, 62 (1st Cir. 1992); *United States v. Caballero*, 936 F.2d 1292, 1299 n.8 (D.C. Cir. 1991); *United States v. Perdomo*, 927 F.2d 111, 116-17 (2d Cir. 1991); *United States v. Howard*, 923 F.2d 1500, 1504 n.4 (11th Cir. 1991). 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); *United States v. Stanberry*, 963 F.2d 1323 (10th Cir. 1992); *United States v. Walton*, 908 F.2d 1289, 1299 (6th Cir. 1990); *United States v. Walker*, 885 F.2d 1353, 1354 (8th Cir. 1989). 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 (Applicable Guidelines). The Statutory Index (Appendix A) provides a listing to assist in this determination.
- (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.[[FN2](#)]

See USSG §1B1.1.

---

### 5.03 CALCULATING THE BASE OFFENSE LEVEL IN TAX CASES

Consistent with the overall plan of the sentencing guidelines, each tax guideline begins with a base offense level. The starting point for a tax crime usually rests upon the dollar amount of the tax loss under the tax table at USSG §2T4.1. Most guidelines also contain "specific offense characteristics" which allow the base offense level to be increased on the basis of certain aggravating facts. Further, the sentencing court determines the total offense level by making any adjustments described in USSG §1B1.1. See Section 5.04, *infra*. Following the determination of the total offense level, the court refers to the corresponding zone in the sentencing table. The sentencing table has four zones, three of which, Zones A through C, permit the court to render a variety of sentences, ranging from probation to split sentences to simple incarceration.

#### 5.03[1] The Base Offense Level

Part T of Chapter Two of the Sentencing Guidelines contains the provisions governing most tax crimes. In determining the starting point for the base offense level, most guidelines in Part T of Chapter Two refer to the amount of the "tax loss" attributable to the defendant. Once the sentencing court determines the total tax loss attributable to a defendant, the tax loss table contained in §2T4.1 then provides the base offense level of the defendant. *United States v. Powell*, 124 F.3d 655, 663 n.7 (5th Cir. 1997).[[FN3](#)]

Under the guidelines as they existed prior to November 1, 1993, the determination of the tax loss depended upon the definition in the particular offense guideline. For example, §2T1.1 defined tax loss for the purposes of tax evasion, whereas §2T1.3 defined tax loss for the purposes of the filing of a false return. On November 1, 1993, however, the guidelines were amended in order to consolidate several tax guidelines (sections 2T1.1, 2T1.2, 2T1.3 and 2T1.5) into §2T1.1. Moreover, this amendment adopted a uniform definition of tax loss, contained within §2T1.1(c). The stated reason for this amendment was 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; see also *United States v. Minneman*, 143

F.3d 274, 282 (7th Cir. 1998)(noting that November 1, 1993 amendment sought "to adopt a 'uniform definition of tax loss' where none had previously existed")(quoting USSG App. C, Amend. 491). Accordingly, now §2T1.1 alone defines tax loss. Further, §2T1.1 now applies to tax evasion, willful failure to file returns, supply information or pay tax, and willful filing of fraudulent or false returns, statements, or other documents.

Section 2T1.1 currently provides that, if there is a tax loss, the base offense level derives from §2T4.1, the tax table, according to the amount of tax loss. §2T1.1(a)(1). Otherwise, the base offense level is 6. §2T1.1(a)(2). "Although the definition of tax loss corresponds to what is commonly called the 'criminal figures,' its amount is to be determined by the same rules applicable in determining any other sentencing factor." §2T1.1, comment. (n.2). Section 2T1.1 currently provides special instructions which, for the purposes of offenses involving attempted income tax evasion and filing false returns or statements, define tax loss 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)." §2T1.1(c)(1). "The sentencing guidelines do not require proof of 'but-for' causation for calculating tax loss." *United States v. Andra*, 218 F.3d 1106, 1107-08 (9th Cir. 2000). Section 2T1.1 also defines tax loss for failure to file offenses, §2T1.1(c)(2), failure to pay offenses, §2T1.1(c)(3), and offenses involving an improperly claimed refund, §2T1.1(c)(4). Section 2T1.1 further describes "presumptions" which a court should employ when calculating the tax loss in various situations involving tax evasion offenses, false return or statement offenses, and failure to file a return offenses. §2T1.1(c)(1) Notes (A)-(C); §2T1.1(c)(2) Note. Specifically, these presumptions provide that the tax loss should equal a certain percentage of the unreported gross income, false credits claimed against tax, or improperly claimed deductions or exemptions at issue, "unless a more accurate determination of the tax loss can be made." §2T1.1(c)(1) Notes (A)-(C); §2T1.1(c)(2) Note.

The commentary to §2T1.1 explains that these presumptions are not binding, but rather serve as general formulas:

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 circumstances 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.

§2T1.1, comment. (n.1). Likewise, the commentary states that a court should use an applicable presumption, unless one of the parties "provides sufficient information for a more accurate assessment of tax loss." *Id*; see also *United States v. Barski*, 968 F.2d 936, 937 (9th Cir. 1992)(rejecting due process challenge to tax loss presumption contained within now-deleted §2T1.3; presumption did not establish irrebuttably that tax loss was 28 percent of unreported taxable income, but merely established "the legally operative fact as the amount of unreported income"). Ultimately, "[i]n some instances, such as when indirect methods of proof are used, the amount of the tax loss may be uncertain; the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts." §2T1.1, comment. (n.1); see also *United States v. Bryant*, 128 F.3d 74, 75-76 (2d Cir. 1997)(per curiam)(relying on §2T1.1 commentary to uphold tax loss estimation for defendant convicted of assisting in the preparation of numerous false returns; estimation included tax loss extrapolated from unaudited returns).

When the parties contest the amount of tax loss, the sentencing court must hold an evidentiary hearing to resolve factual issues, unless the court presided over a trial and may base its findings upon the trial record. *United States v. Marshall*, 92 F.3d 758, 760 (8th Cir. 1996).

In determining the tax loss, a court may consider both charged and uncharged conduct. *United States v. Bove*, 155 F.3d 44, 47-48 (2d



Cir. 1998); *United States v. Noske*, 117 F.3d 1053, 1060 (8th Cir. 1997); *United States v. Meek*, 998 F.2d 776, 781 (10th Cir. 1993). A court also may account for acquitted conduct when calculating the tax loss. *United States v. Kelly*, 147 F.3d 172, 178 (2d Cir. 1998); see generally *United States v. Watts*, 519 U.S. 148, 157 (1997)(per curiam)(guideline range may rest on uncharged conduct or conduct underlying acquitted charges, if conduct is based upon preponderance of evidence). Further, a court may compute tax loss by including tax loss from years barred by the statute of limitations. *United States v. Valenti*, 121 F.3d 327, 334 (7th Cir. 1997); *United States v. Pierce*, 17 F.3d 146, 150 (6th Cir. 1994). Moreover, a court may include state tax losses in the tax loss computation, if the state tax loss constitutes relevant conduct under §1B1.3. *United States v. Fitzgerald*, 232 F.3d 315, 320-21 (2d Cir. 2000) (adding federal, state, and local tax losses proper application of guidelines where all part of relevant conduct to offense of conviction under § 1B1.3(a)(2)); *Powell*, 124 F.3d at 664-65 (when computing tax loss arising from federal motor fuel excise tax scheme, district court properly considered state excise tax loss). (Note, Chapter 3 of this manual contains a Tax Division Memorandum addressing the subject of inclusion of state tax loss in tax loss computation for federal tax offenses under the Sentencing Guidelines.)

Generally, the tax loss computation is not confined to the amount which the government actually lost in taxes, *United States v. Tandon*, 111 F.3d 482, 490 (6th Cir. 1997); *United States v. Kraig*, 99 F.3d 1361, 1370-71 (6th Cir. 1996); *United States v. Hunt*, 25 F.3d 1092, 1095-96 (D.C. Cir. 1994); *United States v. Lorenzo*, 995 F.2d 1448, 1459-60 (9th Cir. 1993), or the amount of tax money which the IRS actually could recover. *United States v. Clements*, 73 F.3d 1330, 1339 (5th Cir. 1996); *United States v. Brimberry*, 961 F.2d 1286, 1292 (7th Cir. 1992). Likewise, the tax loss is not reduced by payment of taxes after notification of an investigation, *Tandon*, 111 F.3d at 490; *United States v. Gassaway*, 81 F.3d 920, 921-22 (10th Cir. 1996), or by payment before sentencing. *United States v. Mathis*, 980 F.2d 496, 497 (8th Cir. 1992); *United States v. Pollen*, 978 F.2d 78, 90-91 (3d Cir. 1992); see also §2T1.1(5) in Guidelines versions subsequent to 1992 (stating that "[t]he tax loss is not reduced by any payment of tax subsequent to the commission of the offense"). Ultimately, the tax loss is based upon the loss intended by the defendant, *Clements*, 73 F.3d at 1339, *United States v. Moore*, 997 F.2d 55, 59-62 (5th Cir. 1993), regardless of whether the intended loss occurred or was realistic. *Moore*, 997 F.2d at 61; *Lorenzo*, 995 F.2d at 1459-60. See § 2T1.1 (Nov. 2000).

A court, however, may not base the tax loss for sentencing purposes upon civil tax liability. *Pierce*, 17 F.3d at 150; *Meek*, 998 F.2d at 783; see also *United States v. Harvey*, 996 F.2d 919, 922 (7th Cir. 1993)(interpreting *United States v. Daniel*, 956 F.2d 540, 544 (6th Cir. 1992), as indicating that civil tax liability is not an adequate substitute for "tax loss").

Likewise, a tax loss calculation cannot include penalties or interest, §2T1.1, comment (n.1); *Powell*, 124 F.3d at 663, although, prior to November 1, 1989, tax loss did include interest. USSG App. C, Amend. 220; see also *United States v. McLaughlin*, 126 F.3d 130, 139 (3d Cir. 1997)(Sentencing Commission did not exceed its statutory authority by including interest on unpaid taxes in tax loss computation under 1988 guidelines). At least three courts have observed that, by failing to include interest and penalties, the guidelines fail to "reflect accurately the criminal behavior," but have held that the plain language of the guidelines prohibit a sentencing court from including penalties and interest in the tax loss computation. *United States v. Hunerlach*, 197 F.3d 1059, 1069-70 (11th Cir. 1999); *United States v. Hopper*, 177 F.3d 824, 831-32 (9th Cir. 1999), cert. denied sub nom. *McKendrick v. United States*, 528 U.S. 1163 (2000); *United States v. Pollen*, 978 F.2d 78, 91 n.29 (3d Cir. 1992).[FN4]

The sentencing court may calculate the total tax loss by accounting for

conduct which occurred during both guideline and pre-guideline years. *Pierce*, 17 F.3d at 150; *United States v. Kienenberg*, 13 F.3d 1354, 1357 (9th Cir. 1994); *United States v. Higgins*, 2 F.3d 1094, 1097 (10th Cir. 1993). If a defendant is convicted of both guideline and pre-guideline offenses, the district court has discretion to sentence the defendant to consecutive terms of imprisonment. *United States v. Scarano*, 76 F.3d 1471, 1478 (9th Cir. 1996); *United States v. Preston*, 28 F.3d 1098, 1099 (11th Cir. 1994); *Pollen*, 978 F.2d at 91-92; *United States v. Hershberger*, 962 F.2d 1548, 1550-52 (10th Cir. 1992); *United States v. Ewings*, 936 F.2d 903, 910 (7th Cir. 1991); *United States v. Lincoln*, 925 F.2d 255, 257 (8th Cir. 1991); *United States v. Garcia*, 903 F.2d 1022, 1025 (5th Cir. 1990); *United States v. Watford*, 894 F.2d 665, 668-70 (4th Cir. 1990).

A circuit split exists regarding how to compute the tax loss when the offense or offenses at issue have caused an understatement of both corporate and individual income. In *United States v. Cseplo*, 42 F.3d 360 (6th Cir. 1994), the defendant, who skimmed funds from his corporation and then failed to declare that income on his personal returns, was convicted of filing false corporate tax returns, in violation of § 7206(1), and of attempting to evade his individual income taxes, in violation of § 7201. *Id.* at 361. Applying the pre-November 1, 1993 version of the guidelines, the *Cseplo* court held that the sentencing court properly aggregated the corporate and individual tax losses when computing total tax loss, and that the proper method of determining total tax loss in such situations is to add 34% of the understated corporate income to 28% of the understated individual income. *Id.* at 362-64. The sentencing court had not reduced the amount of the understated individual income by an amount equal to 34% of the understated corporate income, a sum representing the amount which the corporation would have paid in federal taxes, if it had filed accurate returns. The Sixth Circuit dismissed the concerns of the defendant that this method produced an artificially high tax loss computation by observing:

By choosing to falsify both returns, Cseplo made the deliberate decision to produce separate harm to the government with respect to both tax liabilities. The fact that Cseplo might have been able to claim a corporate salary deduction had he paid himself these moneys honestly and openly does not relieve him from the responsibility for creating the separate tax losses through the illegal course of conduct he chose in this case.

*Id.* at 365.

The Second and Seventh Circuits, however, have adopted a tax loss methodology different from that of the Sixth Circuit. Those circuits have ruled that the total tax loss resulting from individual and corporate returns should be computed by 1) taxing the unreported corporate income at the 34% rate; 2) deducting the amount of corporate tax liability from the total unreported income received by the individual from the corporation; and 3) finally taxing the remaining unreported individual income at the 28% rate. See *United States v. Martinez-Rios*, 143 F.3d 662, 672 (2d Cir. 1998); *United States v. Harvey*, 996 F.2d 919, 921 (7th Cir. 1993); see also *United States v. Bove*, 155 F.3d 44, 47 (2d Cir. 1998) (in case governed by post-November 1, 1993 guidelines, remanding defendant convicted under §7206(1) for resentencing in light of tax loss methodology adopted by Second Circuit in *Martinez-Rios*); *United States v. Bhagavan*, 116 F.3d 189, 192 (7th Cir. 1997) (affirming methodology announced by Seventh Circuit in *Harvey* for cases involving understatement of both corporate and individual tax); *United States v. Wu*, 81 F.3d 72, 74-75 (7th Cir. 1996) (affirming methodology of *Harvey*).

When the Second Circuit chose to follow the tax loss methodology first announced by the Seventh Circuit in *Harvey*, rather than the methodology of the Sixth Circuit in *Cseplo*, it described and analyzed the different approaches of the two circuits by stating the following:

The Guidelines are silent on this precise issue, and the two



courts of appeals that have considered it have reached opposite conclusions. In *Harvey, supra*, the Seventh Circuit adopted the approach urged by Martinez, reasoning that the other method "over states the revenue lost to the Treasury." *Harvey*, 966 F.2d at 921. In contrast, the Sixth Circuit in *Cseplo, supra*, employed the method used by the District Court here, based on its view that the *Harvey* method did not adequately account for the fact that two separate crimes--personal tax evasion and corporate tax evasion--were committed. See *Cseplo*, 42 F.3d at 364.

We agree with the Seventh Circuit's approach, primarily because it bases the calculation on a better approximation of the tax revenue lost to the federal treasury. Although, as we have acknowledged, the 1991 Guidelines do not call for a tax loss calculation based exclusively on the amount of tax liability that the defendant would have incurred had he reported his income truthfully, we think that the 1991 Guidelines' punitive purposes are adequately served by denying defendants the benefit of legitimate but unclaimed deductions.

*Martinez-Rios*, 143 F.3d at 672 (citations omitted).[\[FN5\]](#)

The circuit split described above, however, involves only *how* to aggregate corporate and individual tax loss. Each of the opinions involved in this circuit split still share the common recognition that corporate and individual tax loss should be aggregated in some manner. See, e.g., *United States v. Furkin*, 119 F.3d 1276, 1281 n.1 (7th Cir. 1997) (confirming that, under *Harvey*, tax loss calculation must account for both corporate and individual tax loss created by single transaction); *Bhagavan*, 116 F.3d at 192 (stating the same); *Wu*, 81 F.3d at 74-75 (holding the same); cf. *United States v. Dale*, 991 F.2d 819, 856 (D.C. Cir. 1993) (defendant who skimmed corporate receipts is liable for understatement of personal as well as corporate income). Likewise, and pursuant to the November 1, 1993 amendments, the commentary to §2T1.1 now specifies that, "[i]f the offense involves both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together." §2T1.1, comment. (n.7).[\[FN6\]](#)

As noted, the current version of §2T1.1 contains presumptions which provide that the tax loss for an evasion, false claim, or failure to file offense should equal a certain percentage of the unreported gross income, false credits claimed against tax, or improperly claimed deductions or exemptions at issue, "unless a more accurate determination of the tax loss can be made." §2T1.1(c)(1) Notes (A)-(C); §2T1.1(c)(2) Note. There are few cases which interpret or apply this "more accurate definition of the tax loss" language. When discussing the possible retroactive application of the post-November 1, 1993 guidelines, the Second Circuit suggested in dicta that the "more accurate definition of the tax loss" language requires a tax loss analysis which gives the defendant the benefit of legitimate but unclaimed deductions. See *Martinez-Rios*, 143 F.3d at 671. According to the Second Circuit, the post-November 1, 1993 guidelines therefore "tend[] to produce smaller tax loss figures" than the pre-November 1, 1993 guidelines, which do not permit consideration of legitimate but unclaimed deductions. *Id.* Similarly, the Seventh Circuit has ruled that the current definition of tax loss contained within §2T1.1(c) represents a substantive change, rather than a clarifying amendment, in part because the effect of the definition "is a lowering of offense levels when proper proof is produced. Under the new definition, which allows the court to inquire into the actual tax burden, the authority of the court is expanded to accept proof showing a lesser amount of taxes owed." *United States v. Minneman*, 143 F.3d 274, 283 (7th Cir. 1998).

In contrast, the Sixth Circuit has stated in dicta that, "[a]ll the [more accurate determination of the tax loss] phrase does, as far as we can see, is tell the sentencing court not to calculate the tax loss on the basis of a 28 percent tax rate for individual taxpayers and a 34 percent tax rate for corporate tax payers if a more accurate determination can be made." See *Cseplo*, 42 F.3d at 364. The Sixth Circuit has suggested that the "more accurate determination of the tax loss" language merely

accounts for the possibility of differing tax brackets. *Id.* The Sixth Circuit also has expressed a general policy against allowing a defendant convicted of tax violations to receive every benefit of traditional tax assessment principles during sentencing, noting that "[i]f [a defendant's] unorthodox maneuvers resulted in a higher aggregate tax liability than would have existed otherwise, that is a risk [he] chose to run when he broke the law." *Id.* at 365 n.6; *cf. United States v. Ladum*, 141 F.3d 1328, 1343 (9th Cir. 1998) (defendant claimed that illegal source income enhancement under §2T1.1(b)(1) was inapplicable because he had not realized more than \$10,000 from illegal gun sales, once costs of goods and doing business were accounted for; court rejected claim by citing commentary to §2T1.1 regarding tax loss and declaring that "nothing in the Guidelines requires the government to determine and deduct the portion of overhead expenses fairly allocable to gun sales"); *United States v. Mueller*, 74 F.3d 1152, 1160 (11th Cir. 1996) (under post-November 1, 1993 version of §2T1.1(c), reference to unreported gross income within special instructions regarding tax loss literally means unreported gross income, rather than unreported adjusted gross income).

Regardless of the precise meaning of the phrase "more accurate determination of the tax loss," the pre-November 1, 1993 guidelines generally prevent defendants from reducing the tax loss by relying upon deductions which they could have claimed if they had filed a legitimate return. For example, in *United States v. Parrott*, 148 F.3d 629, 631-32 (6th Cir. 1998), the defendant pleaded guilty to filing a false 1990 tax return and stipulated in his plea agreement to a tax loss exceeding \$70,000. At sentencing, the defendant attempted to reduce this amount of tax loss by invoking certain farm losses which he had not claimed in his original returns. *Id.* at 632. The *Parrott* court upheld the refusal of the district court to reduce the tax loss on the basis of the unclaimed deductions, ruling that, because the tax loss calculation under §2T1.3 was not based necessarily upon the net of concealed income less unclaimed deductions, there was a factual basis to support the stipulated amount of tax loss. *Id.* Further, in *Harvey*, 996 F.2d at 920, the Seventh Circuit declared that the method under the prior guidelines of simply multiplying the amount of gross income at issue by either 28 percent or 34 percent provides a "rough and ready calculation [which] 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." Likewise, in *United States v. Valentino*, 19 F.3d 463, 464-65 (9th Cir. 1994), the Ninth Circuit rejected the claim of a defendant convicted of filing a false tax return that he was entitled to an evidentiary hearing at sentencing in order to show that there was no tax loss because unclaimed depreciation deductions would have exceeded the understated income at issue. Upholding the finding of the district court that the only fact which mattered under the 1992 guidelines was how much income the defendant had concealed, the *Valentino* court stressed that now-deleted commentary to §2T1.1 explained that the methodology for calculating tax loss under §2T1.3 was designed "to make irrelevant the issue of whether the taxpayer was entitled to offsetting adjustments that he failed to claim." *Id.* at 465. Moreover, in *Wu*, 81 F.3d at 74-75, the tax loss calculation of \$1.4 million was based upon both corporate and personal tax loss resulting from funds which the defendant had skimmed from his closely-held corporation. The defendant argued that this tax loss was too high because, in the "real world," owners of closely-held corporations distribute corporate profits through salary and other methods which minimize or eliminate the corporate tax liability. *Id.* at 74. Although the Seventh Circuit agreed with the defendant's description of how owners of closely-held corporations file legitimate returns, the court declined "to make it the responsibility of the United States Courts to comb the books of convicted tax evaders seeking ways in which they could have lowered their tax liability and their sentences. Unfortunately for [the defendant], it is simply not our role to play 'Monday Morning Tax Advisor.'" *Id.*

Finally, even if a sentencing court permits a defendant to attempt to reduce the amount of tax loss attributable to his offense by introducing evidence of unclaimed expenses or deductions, the court ultimately may reject the assertions of the defendant based upon the particular facts. *See United*

*States v. Valenti*, 121 F.3d 327, 333-34 (7th Cir. 1997) (upholding refusal of sentencing court to give defendant convicted of tax evasion and failing to file tax returns credit for asserted legitimate business expenses when sentencing court determined that testimony of defendant was speculative and incredible); see also *United States v. Noske*, 117 F.3d 1053, 1060 (8th Cir. 1997) (defendants convicted of tax fraud conspiracy under 18 U.S.C. §371 were not entitled to charitable deductions for sham distributions to "nonprofit" corporation); cf. *Minneman*, 143 F.3d at 279 (upholding granting of government's motion in limine prohibiting defendant from introducing at trial evidence of legitimate business expenses which he could have claimed, unless defendant first established that he knew at time of filing that deductions were available).

#### 5.03[1][a] Section 7201

Prior to the November 1, 1993, amendments, §2T1.1(a) indicated that the base offense level in evasion cases corresponded to the offense level provided by §2T4.1, the tax table, based upon the amount of tax loss. This former version of §2T1.1(a) further defined tax loss in evasion cases as "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." Now-deleted §2T1.3(a) in turn defined tax loss as "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. If the taxpayer is a corporation, use 34 percent in lieu of 28 percent." Now-deleted commentary to §2T1.1 explained the import of the reference to the tax loss definition contained within §2T1.3:

The guideline refers to §2T1.3 to provide an alternative minimum standard for the tax loss, which is based upon a percentage of the dollar amounts of certain misstatements made in returns filed by the taxpayer. This alternative standard may be easier to determine, and should make irrelevant the issue of whether the taxpayer was entitled to offsetting adjustments that he failed to claim.

§2T1.1, comment. (n.4) (November 1, 1992). Similarly, commentary to now-deleted §2T1.3 indicated that one goal of the tax loss methodology contained within that guideline was to "avoid[] complex problems of proof." §2T1.3, comment. (backg'd) (November 1, 1992).

As noted *supra*, however, §2T1.1 was amended on November 1, 1993. Section 2T1.1 now provides that, if there is a tax loss, the base offense level for tax evasion offenses derives from §2T4.1, the tax table, according to the amount of tax loss. §2T1.1(a)(1). Otherwise, the base offense level is 6. §2T1.1(a)(2). Rather than referring to the definition of tax loss contained within now-deleted §2T1.3, the current version of §2T1.1 defines tax loss for the purposes of evasion offenses 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)." §2T1.1(c)(1). Section 2T1.1 further describes presumptions which a court should employ when calculating the tax loss in various situations involving tax evasion offenses. Generally, these presumptions provide that the tax loss should equal 28% of the unreported gross income or improper deductions or exemptions at issue (unless the taxpayer is a corporation, in which case the applicable percentage is 34%), plus 100% of any falsely claimed credits against tax. §2T1.1(c)(1) Notes (A)-(C). These percentages apply "unless a more accurate determination of the tax loss can be made." *Id.*

#### 5.03[1][b] Section 7203

Prior to an amendment which took effect on November 1, 1993, USSG §2T1.2 governed 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. Again, tax loss governed the base offense level: §2T1.2(a) provided either a base offense level of 1 level less than the level from the tax table, §2T4.1, corresponding to the tax loss or a base offense level of 5,

if there was no tax loss. For purposes of violations of this section, tax loss was defined as "the total amount of tax that the taxpayer owed and did not pay, but, in the event of a failure to file in any year, not less than 10 percent of the amount by which the taxpayer's gross income for that year exceeded \$20,000." §2T1.2(a). Section 2T1.2 provided the alternative measure of the tax loss, 10 percent of gross income over \$20,000, because of the potential difficulty in determining the amount a taxpayer owed. §2T1.2, comment. (backg'd.). Finally, §2T1.2(c) explicitly indicated that USSG §2S1.3 governed violations of §7203 which involved failures to report monetary transactions.

Pursuant to the November 1, 1993 amendment, however, §2T1.2 was deleted. Section 2T1.1, the guideline provision which applies to the majority of tax crimes, now governs the base offense level for violations of §7203 which involve a willful failure to file a return, supply information, or pay tax. §2T1.1; USSG Appendix A. Sections 2T1.1 (c)(2) and (3) define tax loss for offenses involving the failure to file a return or pay tax as "the amount of tax that the taxpayer owed and did not pay;" however, "[i]f the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income (25% if the taxpayer is a corporation) less any tax withheld or otherwise paid, unless a more accurate determination of the tax loss can be made." §§2T1.1(c)(2), Note. The guideline commentary indicates that sentencing courts should employ the above tax loss formula in cases in which the tax loss may not be "reasonably ascertainable," but should disregard the formula if either party provides sufficient information for a more accurate assessment of the tax loss. §2T1.1, comment. (n.1).

In *United States v. Valenti*, 121 F.3d 327, 333-34 (7th Cir. 1997), the district court employed this formula when sentencing a defendant for having failed to file returns and concluded that the tax loss simply equaled twenty percent of the defendant's unreported gross income. The defendant objected that this method failed to produce the most accurate assessment of the tax loss, and that the district court had failed to account for his evidence of his legitimate business expenses. *Id.* The *Valenti* court rejected this claim and upheld the sentence imposed under §2T1.1(c)(2), noting that the district court had found that the defendant's evidence was speculative and incredible, that the government had tried to measure the business expenses accurately, and that it was likely that the defendant had gotten off easy because additional unreported income probably existed. *Id.* at 334.

Finally, §2S1.3, the guideline governing a failure to report a monetary transaction, continues to apply to §7203 violations involving such conduct. §2S1.3; USSG App. A.

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

Prior to the November 1, 1993 amendments, now-deleted §2T1.3 governed the base offense level of §7206(1) violations. Section 2T1.3 indicated that the base offense level in such cases was the level provided by §2T4.1, the tax table, corresponding to the tax loss "if the offense was committed in order to facilitate the evasion of a tax." §2T1.3(a)(1). Otherwise, the base offense level was 6. §2T1.3(a)(2). Section 2T1.3 defined tax loss as "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. If the taxpayers is a corporation, use 34 percent in lieu of 28 percent." §2T1.3(a). Commentary to §2T1.3 explained why the provision generally focused the base offense level for fraudulent or false return offenses on the amount of the false statement:

Existence of a tax loss is not an element of these offenses. Furthermore, in instances where the defendant is setting the groundwork for evasion of a tax that is expected to become due in the future, he may make false statements that underreport income that as of the time of conviction may not yet have resulted in a tax loss. In order to gauge the seriousness of these offenses, the guidelines establish a rule for determining a "tax loss" based on the nature and magnitude of the false statements made. Use of this approach also

avoids complex problems of proof and invasion of privacy when returns of persons other than the defendant and codefendants are involved.

§2T1.3, comment. (backg'd).

As noted *supra*, however, §2T1.1 now governs offenses involving fraudulent or false returns because amendments effective November 1, 1993 deleted §2T1.3. Section 2T1.1 currently provides that the base offense level for fraudulent or false return offenses is the level from §2T4.1, the tax table, corresponding to the amount of tax loss. §2T1.1(a)(1). Otherwise, the base offense level is 6. §2T1.1(a)(2). As with offenses involving tax evasion, §2T1.1 now defines tax loss for the purposes of fraudulent or false return offenses 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)." §2T1.1(c)(1). Section 2T1.1 further describes presumptions which a court should employ when calculating the tax loss in various situations involving fraudulent or false return offenses. Generally, these presumptions provide that the tax loss should equal 28% of the unreported gross income or improperly claimed deductions or exemptions at issue (unless the taxpayer is a corporation, in which case the applicable percentage is 34%), plus 100% of any falsely claimed credits against tax. §2T1.1(c)(1) Notes (A)-(C). These percentages apply "unless a more accurate determination of the tax loss can be made." *Id.*

The section regarding the calculation of base offense levels for tax offenses in general, *see* Section 5.03[1], *supra*, outlines in detail the principles which currently govern the calculation of the base offense level under §2T1.1 for violations of §7206(1). As previously explained, *see supra*, the tax loss calculation under now-deleted §2T1.3 disregarded deductions which would have been available had the taxpayer filed an honest return. *United States v. Valentino*, 19 F.3d 463, 465 (9th Cir. 1994) (noting that now-deleted commentary to §2T1.1 provided that the tax loss standard under §2T1.3 was designed "to make irrelevant the issue of whether the taxpayer was entitled to offsetting adjustments that he failed to claim"); *United States v. Harvey*, 996 F.2d 919, 920 (7th Cir. 1993) (§2T1.3 provides "rough and ready calculation" for tax loss which disregards deductions which would have been available, had defendant filed an honest return).

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

Section 2T1.4 governs the sentencing of defendants who have aided, assisted, procured, counseled, or advised tax fraud. Pursuant to a November 1, 1993 amendment, §2T1.4 provides that the base offense level is the level from §2T4.1, the tax table, corresponding to the amount of tax loss. §2T1.4(a)(1). Otherwise, the base offense level is 6. §2T1.4(a)(2). This provision defines tax loss as "the tax loss, as defined in §2T1.1, resulting from the defendant's aid, assistance, procurance or advice." §2T1.4(a).[FN7] If the defendant advises others to violate their tax obligations by filing returns which have no support in the tax law (such as by promoting a tax shelter scheme), and if such conduct results in the filing of false returns, the misstatements in all such returns will contribute to one aggregate tax loss. §2T1.4, comment. (n.1). This aggregation occurs regardless of whether the principals realized that the returns were false. *Id.*

A sentencing court does not necessarily have to calculate the amount of tax loss attributable to a false return scheme with full certainty or precision. *United States v. Bryant*, 128 F.3d 74, 75-76 (2d Cir. 1997) (per curiam). In *Bryant*, the defendant ran an income tax "mill," assisting in the preparation of 8,521 individual tax returns from 1991 to 1993. *Id.* at 76. The defendant was convicted of violating §7206(2) by assisting in the preparation of twenty-two false tax returns, each of which resulted in an average tax loss of \$2,435. *Id.* Over 99% of all returns prepared by the defendant resulted in refunds. *Id.* The IRS audited more than 20% of the returns prepared by the defendant, discovering that 1,683 of them yielded an average tax loss of \$2,651 each.

*Id.*. During sentencing, the district court calculated the tax loss under §§2T1.4 and 2T4.1 as equaling at least \$5,115,203. *Id.* at 75. This sum was based upon \$53,570 in loss from the twenty-two returns underlying the counts of conviction, \$4,461,633 in loss from the audited returns, and at least \$600,000 in estimated loss from returns prepared by the defendant which the IRS did not audit. *Id.* The defendant complained on appeal that the \$600,000 in tax loss attributed to the unaudited returns was speculative and unfair. Noting that this sum rested upon an average tax loss of less than \$100 per unaudited return, the *Bryant* court rejected this argument, explaining:

The §2T1.1 commentary, which is applicable to a violation of §7206(2), states that "the amount of the tax loss may be uncertain," and it envisions that "indirect methods of proof [may be] used. It states expressly that "the guidelines contemplate that the court will simply make a reasonable estimate based upon the available facts."

[Therefore,] it is permissible for the sentencing court, in calculating a defendant's offense level, to estimate the loss resulting from his offenses by extrapolating the average amount of tax loss from known data and applying that average to transactions where the exact amount of loss is unknown. . . .

We see no reason why [estimation of total tax loss through extrapolation] may not be used in a §7206(2) case in which, as here, the defendant has been convicted of assisting in the preparation of numerous fraudulent tax returns, and government records show many more such instances. Although extrapolation might not be reasonable if . . . there were few instances of fraud, or if the returns audited constituted a minuscule percentage of the total that the defendant prepared or in whose preparation he assisted, we see no unreasonableness here.

*Bryant*, 128 F.3d at 75-76; *cf.* *United States v. Marshall*, 92 F.3d 758, 760-61 (8th Cir. 1996) (trial record supported determination that tax loss equaled \$2,004,961 because defendant admitted that he had prepared more than 1,200 returns, admitted that he controlled all employees in his return preparation business, and returns submitted during sentencing contained the same improprieties as returns underlying §7206(2) convictions).

As with other tax crimes, the tax loss arising from a §7206(2) violation includes the attempted or intended tax loss, rather than the tax loss actually suffered by the government. *United States v. Hunt*, 25 F.3d 1092, 1095-96 (D.C. Cir. 1994); *United States v. Moore*, 997 F.2d 55, 59-61 (5th Cir. 1993); *United States v. Brimberry*, 961 F.2d 1286, 1292 (7th Cir. 1992); *but cf.* *United States v. Schmidt*, 935 F.2d 1440, 1451 (4th Cir. 1991) (stating that actual tax loss was proper basis for computing tax loss), *limited by United States v. Hirschfeld*, 964 F.2d 318, 324-25 (4th Cir. 1992) (holding that, although false deduction did not create tax loss during year in which deduction was claimed, deduction provided basis for anticipated tax loss).

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

The omnibus clause of 26 U.S.C. §7212(a) prohibits an individual from corruptly obstructing or impeding, or endeavoring to obstruct or impede, the due administration of Title 26. Pursuant to an amendment which took effect on November 1, 1993, the statutory index to the guidelines, USSG Appendix A, provides that either §2J1.2, the guideline applying to obstruction of justice, or §2T1.1 normally govern §7212(a) violations involving the omnibus clause. The index also states that §2A2.4, which applies to obstruction of officers, ordinarily governs §7212(a) violations not involving the omnibus clause. Prior to the November 1, 1993 amendment, the statutory index regarding §7212(a) did not refer to either §§2J1.2 or 2T1.1.

Applying a pre-November 1, 1993 version of the guidelines, the Second Circuit upheld the application of §2T1.1 during the sentencing of a defendant who had violated the omnibus clause of §7212(a) by filing a false return, and by providing false documents to the IRS during an audit in order to try to conceal the prior act of filing a false return. *United States v. Kelly*, 147 F.3d 172, 177-78 (2d Cir. 1998). The fact that the defendant had been acquitted of the charge of filing a false tax return did not prevent the district court from applying §2T1.1 or enhancing the sentence on the basis of the tax loss. *Id.* at 178. In another case governed by the pre-November 1, 1993 guidelines, the parties did not contest the conclusion of the district court that §2T1.1 was the most appropriate sentencing guideline for the §7212(a) conviction at issue. *United States v. Brennick*, 134 F.3d 10, 12-13 (1st Cir. 1998). Further, the First Circuit accepted the application of §2T1.1 by the district court because the defendant's §7212(a) conviction rested upon acts of concealment and upon the deliberate underpayment of taxes. *Id.*

Interpreting a pre-November 1, 1993 version of the guidelines, the Ninth Circuit upheld the application of the general obstruction of justice guideline, §2J1.2, during the sentencing of a defendant convicted of violating the omnibus clause of §7212(a). *United States v. Van Krieken*, 39 F.3d 227, 230-31 (9th Cir. 1994). Noting that the defendant had filed false returns and sought to have the IRS levy on innocent taxpayers, the *Van Krieken* court implied that the commentary accompanying §2J1.2 indicated that the guideline applied to such attempts to obstruct a civil or administrative proceeding or evade legal process. *Id.* at 231. The *Van Krieken* court also observed that the November 1, 1993 amendment, which states in part that §2J1.2 can apply to omnibus clause convictions, was a clarifying amendment which applied to the defendant and supported the use of §2J1.2 during his sentencing. *Id.* at 231 n.2. Similarly, and again interpreting the pre-November 1, 1993 guidelines, the Eighth Circuit held that §2J1.2 is the most appropriate guideline for §7212(a) omnibus clause violations. *United States v. Dykstra*, 991 F.2d 450, 453-54 (8th Cir. 1993). Noting 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 §7212(a), the *Dykstra* court approved the use of §2J1.2 during the sentencing of a §7212(a) omnibus clause violation. *Id.* Relying upon this holding in *Dykstra*, the Ninth Circuit found that a district court did not commit plain error under the 1989 sentencing guidelines by applying §2J1.2 to defendants who had violated the omnibus clause of §7212(a) by targeting and attempting to intimidate IRS officials conducting collection proceedings, and by attempting to use false claims for refunds to offset an assessed tax liability. See *United States v. Koff*, 43 F.3d 417, 419 (9th Cir. 1994).

Finally, some opinions which have reviewed sentencings under pre-November 1993 guidelines have approved the application of other guideline provisions to convictions under the §7212(a) omnibus clause. For example, the Eleventh Circuit declined to apply the assault guidelines after finding that the defendant's §7212(a) omnibus clause conviction was based on evidence of his transferring real estate to his spouse, and of his filing an altered lien notice in an attempt to cause the release of that lien. *United States v. Shriver*, 967 F.2d 572, 574 (11th Cir. 1992). The court decided that the guideline which most closely tracked the defendant's actions was §2F1.1, which governs cases of fraud and deceit. *Id.* at 573-74. Likewise, the Ninth Circuit declined to apply the assault guidelines to the §7212(a) omnibus clause conviction of a defendant who had filed a false return seeking a refund, as well as false 1096 and 1099 forms. *United States v. Hanson*, 2 F.3d 942, 947 (9th Cir. 1993). The *Hanson* court also reversed the district court's application of §2T1.9, which applies to tax fraud conspiracies, because the defendant had acted alone. *Id.* Instead, the *Hanson* court found that the guideline section most analogous to the defendant's conduct was now-deleted §2T1.5, which governed the sentencing of §7207 offenses involving fraudulent returns, statements, or other documents. *Id.* The Ninth Circuit subsequently distinguished the conclusion in *Hanson* that §2T1.5 is the most



analogous guideline for a §7212(a) omnibus clause conviction by relying upon the holding in *Dykstra, supra*, and ruling that it was not plain error to apply §2J1.2 in a case involving defendants who had targeted and attempted to intimidate IRS officials, and had tried to use false claims for refunds to offset an assessed tax liability. See *Koff*, 43 F.3d at 419; see also *Van Krieken*, 39 F.3d at 230-31 (declining to follow *Hanson* and upholding use of §2J1.2 in case involving defendant who had filed false returns and had sought tax levies on innocent IRS employees).

Because the statutory index now identifies both §§2J1.2 and 2T1.1 as appropriate guideline provisions for §7212(a) omnibus clause violations, and because the statutory index does not establish an exclusive list of the guideline provisions which are potentially applicable to any offense, a sentencing court still must determine which guideline is the most appropriate provision for the particular omnibus clause violation at issue. *Van Krieken*, 39 F.3d at 231 n.2. Section 2J1.2 establishes a base offense level of 12, subject to certain enhancements for specific offense characteristics. Section 2T1.1, however, establishes a base offense level of either 6, if there is no tax loss, or a higher base offense level, corresponding to the specific tax loss under the tax table. Under the current tax loss table, a tax loss of more than \$23,500, but no more than \$40,000, results in a base offense level of 12. §2T4.1. Accordingly, §2J1.2 ordinarily will yield a higher base offense level than §2T1.1 if the tax loss is \$23,500 or less, whereas §2T1.1 ordinarily will yield a higher base offense level than §2J1.2 if the tax loss exceeds \$40,000.

#### 5.03[1][f] Sections 286 and 287

Section 287 of Title 18 prohibits the knowing presentation of false, fictitious, or fraudulent claims to the government. Similarly, 18 U.S.C. §286 prohibits conspiracies to defraud the government by obtaining or aiding to obtain the payment of any false, fictitious or fraudulent claim. In the criminal tax context, these statutes generally apply to individuals who file income tax returns claiming false or fraudulent refunds of income tax. The general sentencing guideline pertaining to fraud, §2F1.1, governs sentencings for §§286 and 287 violations, including false claims for tax refunds.<sup>[FN8]</sup> USSG Appendix A; *United States v. Fleming*, 128 F.3d 285, 287 (6th Cir. 1997). Section 2F1.1 establishes a base offense level of 6 for crimes involving fraud or deceit, §2F1.1(a), and provides for an increase in the base offense level corresponding to the amount of loss exceeding \$2,000, as calculated by the sentencing court. §§2F1.1(b)(1)(A)-(S). "The commentary directs the sentencing court to calculate the 'intended loss that the defendant was attempting to inflict . . . if it is greater than the actual loss'" *Fleming*, 128 F.3d at 287 (quoting §2F1.1, comment. (n.7)). Further, loss under §2F1.1 includes the intended loss attributable to a common scheme or course of conduct by the defendant, regardless of the number of counts of conviction in a multiple-count indictment, and regardless of the actual loss. *Id.*

Defendants who pursue false claim for refund schemes may be responsible at sentencing for the total sum of refunds claimed, even if the taxpayers in whose names the false returns were filed might have been able to claim legitimate refunds. In *Fleming*, the defendant was convicted of twenty-five counts of violating §287, based upon his preparation of tax returns containing false claims for refunds in the names of third-party taxpayers. *Id.* at 286. The district court sentenced the defendant according to the total dollar amount of refunds claimed in the twenty-five returns underlying his convictions, as well as refunds claimed in thirty-two additional false returns introduced at sentencing. *Id.* The defendant challenged this tax loss calculation, arguing that the district court had enhanced his sentence improperly because the government had not established the employment or income status of the thirty-two taxpayers associated with the returns introduced at sentencing. *Id.* Likewise, he argued that up to five of the taxpayers associated with the returns underlying his counts of convictions actually had earned legitimate income. *Id.* The *Fleming* court rejected his claims, finding that any portion of the

total loss that the third-party taxpayers might have been entitled to claim legally was irrelevant to the loss computation because the defendant had fabricated every W-2 form, dependent, and employer associated with the returns which he had prepared. *Id.* at 288-89. As the Sixth Circuit observed, "[i]t was simply fortuitous that some of those whom Mr. Fleming preyed upon were employed . . . Their actual income and employment status did not influence his choice when he recruited them; he cannot use those facts now to narrow the scope of the fraud he designed." *Id.*

Likewise, a defendant involved in a conspiracy to file numerous false claims for tax refunds will be held accountable at sentencing for the entire amount of loss which was reasonably foreseeable to the defendant. *United States v. Okoronkwo*, 46 F.3d 426, 438 (5th Cir. 1995)(holding that evidence supported finding that defendant was responsible for 75% of all false claims filed through certain tax preparation office, including false claims filed by other co-conspirators, because defendant joined conspiracy early and had a central role); *United States v. Atkins*, 25 F.3d 1401, 1403-04 (8th Cir. 1994)(rejecting claim that defendant was responsible for only four of thirty false claims for refund filed; involvement of defendant in every level of the conspiracy, coupled with her close working relationship with co-conspirator, indicated that loss arising from all thirty false returns was reasonably foreseeable). The government, however, carries the burden of supporting through sufficient evidence any contested sentencing increase based upon the amount of loss. *United States v. Rice*, 52 F.3d 843, 848 (10th Cir. 1995).

#### 5.03[1][g] Section 371

Section 2T1.9 of the sentencing guidelines governs conspiracies to "defraud the United States by impeding, impairing, obstructing and defeating . . . the collection of revenue." §2T1.9, comment. (n.1)(quoting *United States v. Carruth*, 699 F.2d 1017, 1021 (9th Cir. 1983). This guideline applies to what is commonly called a "Klein conspiracy," as described in *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957). This guideline does not apply to taxpayers, such as husband and wife, who jointly evade taxes or file a fraudulent return. §2T1.9, comment. (n.1). Pursuant to a November 1, 1993 amendment, §2T1.9 directs the court to use the base offense level determined by §2T1.1 or §2T1.4, according to which guideline most closely addresses the underlying conduct, if that offense level is greater than 10. §2T1.9, comment. (n.2).[FN9] If §2T1.1 or §2T1.4 do not provide an offense level greater than 10, the base offense level under §2T1.9 is 10. *Id.*; but cf. *United States v. Goldberg*, 105 F.3d 770, 777 (1st Cir. 1997)(commenting in dicta that government "sensibly" chose not to appeal downward departure based upon view of district court that base offense level of 8 under §2T1.4 was "more reflective" of defendant's conduct than base offense level of 10 under §2T1.9 because tax loss was only \$3,000 to \$5,000).

When calculating the tax loss attributable to a defendant convicted of a *Klein* conspiracy offense, the court should hold the defendant responsible for "all reasonably foreseeable acts and omissions . . . in furtherance of the jointly undertaken criminal activity." *United States v. Ladum*, 141 F.3d 1328, 1346 (9th Cir. 1998)(quoting USSG §1B1.3(a)(1)(B)). "This requires a determination of 'the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement)." *Id.* (quoting §1B1.3, comment. (n.2)). Accordingly, a court should sentence a defendant according to the tax loss which he directly caused, as well as the tax loss which his coconspirator caused, if that tax loss was reasonably foreseeable to the defendant. *United States v. Clark*, 139 F.3d 485, 490 (5th Cir.) (citing *United States v. Charroux*, 3 F.3d 827, 838 (5th Cir. 1993)), cert. denied, 525 U.S. 899 (1998); see also *United States v. Fleschner*, 98 F.3d 155, 160 (4th Cir. 1996)(tax loss finding was not confined to assessing only conduct which occurred when coconspirators were physically together or acting in unison at Patriot meetings). Further, "[i]n assessing the amount of tax loss, the district court is to make a 'reasonable estimate' of the amount of the loss that the defendant intended to inflict, not the actual amount of the government's loss." *United States*

*v. Kraig*, 99 F.3d 1361, 1370-71 (6th Cir. 1996). Whether the conspirators actually completed the offense is irrelevant to calculating the offense level. *United States v. Dale*, 991 F.2d 819, 855 (D.C. Cir. 1993). A district court applies the preponderance of the evidence standard when determining the duration of a conspiracy at sentencing. *United States v. Furkin*, 119 F.3d 1276, 1281 (7th Cir. 1997).

If a defendant is convicted of a count charging a conspiracy to commit more than one offense, a sentencing court should 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." *Dale*, 991 F.2d at 854 (quoting §1B1.2(d)). After calculating the offense level for each such "separate" conspiracy, the 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." *Id.* (citing §3D1.2). The court then must sentence according to the offense level for the most serious counts comprising the group. *Id.* (citing §3D1.3).

Consistent with general sentencing guideline law, loss computations regarding Klein conspiracies may rest upon conduct which was uncharged, or for which the defendant was acquitted. For example, in *United States v. Seligsohn*, 981 F.2d 1418 (3d Cir. 1992), the defendants paid cash as part of wages earned by employees, under reported their total payroll, filed false reports with the IRS regarding withholding taxes, and deprived a union welfare plan of its entitlement. Although the indictments charged only a conspiracy with respect to the personal returns, the defendants' sentences were based upon a tax loss attributable to the defendants' companies, rather than only the amount of individual tax loss. *Id.* 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." *Id.* The Fifth Circuit has held that a defendant who has been acquitted of conspiracy may be held liable as a co-conspirator for sentencing purposes. *United States v. Hull*, 160 F.3d 265, 269-70 (5th Cir. 1998).

Finally, a sentencing court should make specific findings regarding the amount of reasonably foreseeable tax loss. In *Ladum, supra*, the sentencing court found that one defendant participated for ten years in a thirteen-year tax fraud scheme which involved the under-reporting of gross business receipts from several stores. *Ladum*, 141 F.3d at 1346-47. The sentencing court further found that this defendant was responsible for the entire tax loss attributable to the conspiracy, which exceeded \$550,000. *Id.* The district court, however, failed to make a specific factual finding regarding whether the tax loss which occurred when the defendant was not participating in the conspiracy was reasonably foreseeable to him. *Id.* at 1347. Stating that it was not "self-evident" that the defendant would have foreseen the tax loss arising from stores which did not exist when he ceased participating in the conspiracy, or from the stores which had existed when he left the conspiracy, the Ninth Circuit remanded so that the district court could make specific factual findings regarding the reasonably foreseeable tax loss. *Id.*

### 5.03[2] Specific Offense Characteristics

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

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

The guideline governing violations of 26 U.S.C. §§ 7201, 7203, 7206 (with the exception of §7206(2)), and 7207 requires an increase in the base offense level if the defendant failed either to report or correctly identify the source of income of over \$10,000 in any year resulting from criminal activity. §2T1.1(b)(1). The phrase "criminal activity" means "any conduct

constituting a criminal offense under federal, state, local, or foreign law." §2T1.1, comment. (n.3).[\[FN10\]](#)

Courts have upheld illegal source income enhancements in a variety of circumstances. See *United States v. Fitzgerald*, 232 F.3d 315, 321 (2d Cir. 2000) (enhancement proper where defendant intentionally converted more than \$107,000 from union welfare fund and defrauded medical specialists of such funds); *United States v. Parrott*, 148 F.3d 629, 633-34 (6th Cir. 1998) (enhancement proper when defendant misappropriated \$282,000 of clients' funds, thereby committing theft under state law); *United States v. Ladum*, 141 F.3d 1328, 1343 (9th Cir. 1998) (enhancement proper when defendants obtained facially valid firearms license by making false statements on license application and license enabled defendants to sell more than \$10,000 in guns); *United States v. Karterman*, 60 F.3d 576, 582-83 (9th Cir. 1995) (enhancement proper when defendant distributed several pounds of cocaine per month, earned limited income from legitimate business, and lived expensive life style); cf. *United States v. Griggs*, 47 F.3d 827, 829 (6th Cir. 1995) (noting uncontested finding by sentencing court that enhancement applied because defendant had failed to identify source of approximately \$475,000 in embezzled funds).

The illegal source income enhancement requires the defendant to have received more than \$10,000 from criminal activity within a given year. In *United States v. Barakat*, 130 F.3d 1448, 1453-54 (11th Cir. 1997), the sentencing court had imposed a §2T1.1(b)(1) enhancement upon the defendant, who had received and deposited in December, 1988 a \$5,000 check derived from criminal activity, and had received and deposited in January, 1989 another check for \$10,000 check also derived from criminal activity. Observing that the propriety of the enhancement depended upon the definition of a "year" under §2T1.1(b)(1), the *Barakat* court employed the definition of "taxable year" contained within 26 U.S.C. §441, which, in the case of this defendant, a personal income tax filer who did not keep accounting records, meant "taxable year." *Id.* at 1453 (citing §441(g)). Because the defendant was convicted of filing a false tax return for the calendar year 1989, and because he had not received more than \$10,000 from criminal activity in 1989, the *Barakat* court reversed the §2T1.1(b)(1) enhancement. *Id.* at 1454; see also *United States v. Schmidt*, 935 F.2d 1440, 1451-2 (4th Cir. 1991), *appeal after remand*, 983 F.2d 1058 (4th Cir. 1992) (reversing enhancement when defendant received no more than \$8,000 in income from criminal activity in 1987 and received no more than \$2,000 in such income in 1988).

The \$10,000 threshold of the illegal source income enhancement does not refer to profit; rather, the terms of §2T1.1(b)(1) refer broadly to "income." In *Ladum*, *supra*, the defendant claimed that the enhancement was inapplicable because there was no evidence that he had realized more than \$10,000 from his illegal firearms trade once the district court had accounted for overhead and the costs of goods. *Ladum*, 141 F.3d at 1343. The Ninth Circuit rejected this argument by first noting that the illegal source income figure at issue was derived by subtracting the cost of goods sold from the sales prices. *Id.* [\[FN11\]](#) The *Ladum* court also declared that, for the purposes of §2T1.1(b)(1), "nothing in the Guidelines requires the government to determine and deduct the portion of overhead expenses fairly allocable to gun sales." *Id.*

As with any enhancement, the government must provide the court with a factual basis on which to find by a preponderance of the evidence that a contested enhancement for illegal source income applies. *United States v. Hagedorn*, 38 F.3d 520, 522-23 (10th Cir. 1994) (remanding for factual inquiry regarding applicability of illegal source income enhancement when charging document to which the defendant pleaded guilty did not establish intent for racketeering offense and sentencing court relied solely upon contents of charging document). In at least one case, however, the error of the district court in relying solely upon the presentence report as the factual basis for a contested illegal source income enhancement was harmless: by pleading guilty to one count of filing a false tax return, the defendant thereby admitted that money which he secretly took from his clients and did not report on his tax return was income to himself. *Parrott*, 148 F.3d at 633-34. Accordingly, the

defendant implicitly and necessarily admitted that he had committed theft of property under state law, and that the money did not constitute a loan.  
*Id.*

Ninth Circuit precedent holds that, although a conviction regarding the income-producing criminal offense is not necessary for an illegal source income enhancement, such an enhancement may not rest upon conduct of which the defendant was acquitted, or upon facts which the jury necessarily rejected. See *Karterman*, 60 F.3d at 580-81. Because the Supreme Court subsequently has ruled, however, that a sentencing court may take into account relevant conduct of which a defendant was acquitted, so long as the government has proven the acquitted conduct by a preponderance of the evidence, see *United States v. Watts*, 519 US. 148, 157 (1997) (per curiam), this holding in *Karterman* is no longer good law. See also *Barakat*, 130 F.3d at 1442 (under *Watts*, §2T1.1(b)(1) enhancement may rest upon income-producing criminal conduct of which the defendant was acquitted); *United States v. Sherpa*, 97 F.3d 1239, 1245 (9th Cir.), *amended*, 110 F.3d 656 (9th Cir. 1996) (noting that Supreme Court overruled in part *Karterman* and other Ninth Circuit opinions by holding in *Koon v. United States*, 518 U.S. 81, 106-08 (1996), that sentencing court could consider facts which jury necessarily rejected).

#### 5.03[2][b] **Sophisticated Concealment**[\[FN12\]](#)

Pursuant to an amendment effective November 1, 1998, the tax guidelines for violations of 26 U.S.C. §§ 7201, 7203, 7206, and 7207 provide for a two-level enhancement of the base offense level if "the offense involved sophisticated concealment." §§2T1.1(b)(2); 2T1.4(b)(2).

"[S]ophisticated concealment" means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.

§§2T1.1, comment. (n.4); 2T1.4, comment. (n.3). Prior to the November 1, 1998 amendment, this enhancement provided for a two-level increase of the base level offense "[i]f sophisticated means were used to impede discovery of the existence or extent of the offense." §§2T1.1(b)(2); 2T1.4(b)(2) (November 1, 1997). The pre-November 1, 1998 sentencing guidelines provide that "sophisticated means . . . includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells or fictitious entities." §§2T1.1, comment. (n.4); 2T1.4, comment. (n.3) (November 1, 1997). Commentary regarding both the pre- and post-November 1, 1998 versions of this enhancement provides that, "[a]lthough tax offenses always involve some planning, unusually sophisticated efforts to conceal the offense decrease the likelihood of detection and therefore warrant an additional sanction for deterrence purposes." §2T1.1, comment. (backg'd).

The Sentencing Commission has indicated that it views the November 1, 1998 amendment regarding this enhancement as a clarification, rather than as a substantive change. USSG App. C, Amend. 577. The Sentencing Commission further has explained:

The primary purpose of this amendment is to conform the language of the current enhancement for "sophisticated means" in the tax guidelines to the essentially equivalent language of the new sophisticated concealment enhancement provided in the fraud guideline[, §2F1.1]. Additionally, the amendment resolves a circuit conflict regarding whether the enhancement applies based upon the personal conduct of the defendant or the overall conduct for which the defendant is accountable. Consistent with the usual relevant conduct rules, application of this new enhancement for sophisticated concealment accordingly is based on the overall offense conduct for



which the defendant is accountable.[[FN13](#)]

*Id.* Because no published cases have yet interpreted the amended version of this enhancement, the following discussion will rely solely upon cases applying the "sophisticated means" language. These cases should inform, if not control, the interpretation of the new "sophisticated concealment" language, especially given the view of the Sentencing Commission that the November 1, 1998, amendment constitutes only a clarification of previously existing law.

Conduct need not involve banking or financial methods in order to constitute sophisticated means. *United States v. Friend*, 104 F.3d 127, 130 (7th Cir. 1997). Even if certain acts would not constitute sophisticated means when considered in isolation, they can constitute sophisticated means when viewed in the aggregate. *United States v. Tandon*, 111 F.3d 482, 491 (6th Cir. 1997). Further, the sophisticated conduct at issue may occur during the actual commission of the tax offense, because "the guideline contemplates enhancement based on the degree of sophistication, not necessarily whether it came after the conclusion of the operative portion of the tax scheme." *United States v. Hunt*, 25 F.3d 1092, 1097 (D.C. Cir. 1994).

Courts have upheld the application of this enhancement for a variety of reasons. Specifically, courts have found that indicia of sophisticated means include the following:

1. Use of shell corporations. §§2T1.1, comment. (n.4); 2T1.4, comment. (n.3); *United States v. Cianci*, 154 F.3d 106, 110 (3d Cir. 1998); *United States v. Whitson*, 125 F.3d 1071, 1075 (7th Cir. 1997); *United States v. Kraig*, 99 F.3d 1361, 1371 (6th Cir. 1996); *United States v. Paradies*, 98 F.3d 1266, 1292 (11th Cir. 1996).
2. Use of cash transactions. *United States v. Middleton*, 246 F.3d 825, 848 (6th Cir. 2001); *Cianci*, 154 F.3d at 110; *United States v. Furkin*, 119 F.3d 1276, 1285 (7th Cir. 1997).
3. Failure to record income or inventory. *Cianci*, 154 F.3d at 110; *Furkin*, 119 F.3d at 1285.
4. Destruction of records. *Furkin*, 119 F.3d at 1285; *United States v. Hammes*, 3 F.3d 1081, 1083 (7th Cir. 1993).
5. Deposit of funds in a trust account. *United States v. Minneman*, 143 F.3d 274, 283 (7th Cir. 1998); *but cf. United States v. Barakat*, 130 F.3d 1448, 1457-58 (11th Cir. 1997)(remanding for reconsideration of whether use of trust account justified enhancement, and directing district court to consider only evidence which related to tax offense conviction).
6. Deposit of funds in a bank account not directly attributable to the defendant. *Tandon*, 111 F.3d at 490; *United States v. Lewis*, 93 F.3d 1075, 1081-83 (2d Cir. 1996); *United States v. Clements*, 73 F.3d 1330, 1340 (5th Cir. 1996); *United States v. Wu*, 81 F.3d 72, 74 (7th Cir. 1996); *Hammes*, 3 F.3d at 1083; *United States v. Becker*, 965 F.2d 383, 390 (7th Cir. 1992).
7. Use of offshore bank accounts. §§2T1.1, comment. (n.4); 2T1.4, comment. (n.3); *Whitson*, 125 F.3d at 1075; *Kraig*, 99 F.3d at 1371; *Hammes*, 3 F.3d at 1083.
8. Use of false documents. *Cianci*, 154 F.3d at 110; *United States v. Madoch*, 108 F.3d 761, 766 (7th Cir. 1997); *Lewis*, 93 F.3d at 1081;

*Wu*, 81 F.3d at 74; *United States v. Jagim*, 978 F.2d 1032, 1042 (8th Cir. 1992).

9. Use of fictitious names, *Tandon*, 111 F.3d at 491; *Madoch*, 108 F.3d at 766; *Wu*, 81 F.3d at 74; *Hammes*, 3 F.3d at 1083, or fictitious entities. *Lewis*, 93 F.3d at 1082; *United States v. Veksler*, 62 F.3d 544, 550-51 (3d Cir. 1995).
10. Use of multiple corporate names. *Minneman*, 143 F.3d at 283.
11. Manipulation of ownership of income-producing assets. *Tandon*, 111 F.3d at 491.
12. Arranging for the IRS to mail multiple refund checks to several different addresses. *Madoch*, 108 F.3d at 766.
13. Befriending and bribing an IRS employee in order to provide insurance against detection of tax scheme. *Friend*, 104 F.3d at 130.
14. Depositing receipts in non-interest bearing business bank accounts. *Middleton*, 246 F.3d at 848.
15. Using unauthorized social security numbers, filing false tax returns, and having tax refund checks mailed to mail drop. *United States v. Aragbaye*, 234 F.3d 1101, 1107-08 (9th Cir. 2000).

The above list is not an exhaustive description of acts which may justify an enhancement for sophisticated means. Courts also have upheld the application of this enhancement on the basis of other circumstances. See, e.g., *United States v. Guidry*, 199 F.3d 1150, 1158-59 (10th Cir. 1999)(defendant's embezzled money came from checks made payable to bank that she then converted to cash to purchase personal items and defendant never took more than \$10,000 in one day to avoid filing of Currency Transaction Reports); *United States v. Powell*, 124 F.3d 655, 666 (5th Cir. 1997)(defendant purchased ethanol plant to facilitate scheme in order to avoid fuel excise taxes; *United States v. Pierce*, 17 F.3d 146, 151 (6th Cir. 1994)(defendant provided inapplicable IRS publication to employer to exempt himself from withholding taxes, used several different mailing addresses in different IRS regions, changed excessive number of withholding deductions in accordance with changes in IRS regulations, and directed wife to file misleading returns); *United States v. Ford*, 989 F.2d 347, 351 (9th Cir. 1993)(defendant used foreign corporation to generate corporate foreign tax payments in order to claim foreign tax credits on domestic personal income tax returns).

Merely making misrepresentations on a tax return likely does not justify an enhancement for sophisticated means. *Powell*, 124 F.3d at 666; *United States v. Rice*, 52 F.3d 843, 849 (10th Cir. 1995)(enhancement inapplicable because defendant only claimed that he had paid taxes which he had not); see also *United States v. Stokes*, 998 F.2d 279, 282 (5th Cir. 1993)(stating that "[t]here is nothing sophisticated about simply not disclosing income to your accountant").

Although this enhancement should not apply if the defendant uses sophisticated means solely to commit a crime in order to obtain the income at issue in the tax offense conviction, this enhancement can rest upon sophisticated conduct which served both as means to obtain income and to further the tax crime relating to that income. "The mere fact that the scheme might have been more sophisticated or may have had some uncomplicated elements does not preclude the enhancement." *United States v. Utecht*, 238 F.3d 882, 889 (7th Cir. 2001). While it is apparent that some degree of concealment is inherent in every tax fraud case, sophistication of concealment refers not to the elegance, class, or style of the defrauder but to the presence of efforts at concealment that go beyond this inherent concealment. *United States v. Kontry*, 238 F.3d 815, 820-21 (7th Cir.), cert. denied, 121 S.Ct. 1964 (U.S. May 14,



2001). For example, in *United States v. Mankarious*, 151 F.3d 694, 710-11 (7th Cir. 1998), the Seventh Circuit held that the enhancement applied because the scheme at issue had the dual effect of creating illicit gain and hiding that gain from the IRS. Likewise, in *Cianci*, *supra*, the Third Circuit held that the enhancement applied because, although the sophisticated methods of the defendant impeded the discovery of his embezzlement offense, those methods also facilitated the concealment of the income which he derived from the embezzlement. *Cianci*, 154 F.3d at 109.

In *Stokes*, *supra*, however, the defendant deposited money which she had embezzled from her employer into two separate bank accounts. She then wrote checks to herself and transferred the money into money orders. *Stokes*, 998 F.2d at 280. The Fifth Circuit reversed the district court's application of the sophisticated means enhancement, finding that the defendant had used sophisticated methods to commit the crime of embezzlement, but not the crime of tax evasion. *Id.* at 282. The Fifth Circuit stated that the defendant had hid the money which she had embezzled because she did not want her employer to discover her embezzlement, not because she wanted to avoid paying her taxes. *Id.*

Despite the implication by the Fifth Circuit in *Stokes* that this enhancement is inapplicable unless the sophisticated conduct pertains solely to the tax offense of conviction, or unless the defendant employs sophisticated methods for the specific and sole purpose of concealing her tax status, the Seventh Circuit has held that this enhancement may apply even if the defendant did not intend specifically to hinder the ability of the IRS to discover the tax offense at issue. In *Mankarious*, 151 F.3d at 711, the Seventh Circuit upheld an application of this enhancement because, "[w]hether or not the defendants consciously intended it, the [underlying fraud] scheme would have thwarted IRS from successfully auditing the defendants and determining their real income." Accordingly, "the scheme constituted a sophisticated means of tax fraud, even if that was not its primary purpose." *Id.*; see also *Barakat*, 130 F.3d at 1457 (distinguishing *Stokes* by characterizing opinion as holding only that mere concealment of income from accountant cannot constitute sophisticated means).

Finally, a sentencing court may impose simultaneous enhancements for use of sophisticated means and for being in the business of preparing or assisting in the preparation of tax returns, under §2T1.4(b)(1)(B). *Hunt*, 25 F.3d at 1098. Similarly, a sentencing court may impose simultaneous enhancements for use of sophisticated means and for obstruction of justice, under §3C1.1, *Friend*, 104 F.3d at 130-31; *Furkin*, 119 F.3d at 1284-85, so long as separate conduct forms the factual basis for each enhancement. *Friend*, 104 F.3d at 131. Also, a sentencing court may impose enhancements as provided for by §2F1.1(b)(2)(A) (more-than-minimal planning) and §2F1.1(b)(5)(C) (use of sophisticated means) cumulatively. *United States v. Humber*, 2001 WL 754469, \*5 (11th Cir. July 5, 2001) ("[s]ophisticated means involves more than minimal planning. More than minimal planning, however, does not necessarily involve sophisticated means. A defendant who uses sophisticated means will always receive, in addition, an enhancement for more than minimal planning.") (citations omitted).

A defendant may not use the doctrine of judicial estoppel to bar application of the sophisticated means enhancement when a prosecutor argues in closing that a defendant's scheme was "not particularly sophisticated" because such argument was neither a ground for conviction nor inconsistent with the position taken by the prosecutor at sentencing. *United States v. Newell*, 239 F.3d 917, 922 (7th Cir. 2001).

#### 5.03[2][c] Substantial Portion of Income Derived From Criminal Scheme

The sentencing guideline governing the aiding, assisting, procuring, counseling, or advising of tax fraud, in violation of 26 U.S.C. §7206(2), provides for a two-level enhancement of the offense level if "the defendant committed the offense as part of a pattern or scheme from which he derived a substantial portion of his income." §2T1.4(b)(1)(A). This enhancement

applies, for example, to defendants who derive a substantial portion of their income through the promotion of fraudulent tax shelters. §2T1.4, comment. (n.2).

The Fifth Circuit has upheld a sentencing court's use of the quasi-formula regarding whether a defendant's criminal activity constituted his livelihood, contained within USSG §4B1.3, when determining whether to impose an enhancement under §2T1.4(b)(1)(A). *United States v. Welch*, 19 F.3d 192, 194-95 (5th Cir. 1994). Under §4B1.3, a defendant has committed an offense as part of a pattern of criminal conduct "engaged in as a livelihood" when

(1) the defendant derived income from the pattern of criminal conduct that in any twelve-month period exceeded 2,000 times the then existing hourly minimum wage under federal law; and (2) the totality of circumstances shows that such criminal conduct was the defendant's primary occupation in that twelve-month period (e.g., the defendant engaged in criminal conduct rather than regular, legitimate employment; or the defendant's legitimate employment was merely a front for his criminal conduct).

§4B1.3, comment. (n.2). In *Welch*, the defendant argued that use of §4B1.3 was improper because §2T1.4 does not explicitly authorize the sentencing court to refer to §4B1.3 when determining whether to enhance under §2T1.4(b)(1)(A). *Id.* at 194. Rejecting this claim, the court noted that the guidelines do not specify what constitutes a "substantial portion" of one's income, and that the Fifth Circuit previously upheld application of §4B1.3 to other specific offenses, even though the guidelines governing those specific offenses did not refer to §4B1.3. *Id.* at 194-95. The court further observed that the wordings of §2T1.4(b)(1)(A) and §4B1.3 are nearly identical. *Id.* at 195 n.6. Applying the §4B1.3 formula to the facts of the case, the *Welch* court upheld the §2T1.4(b)(1)(A) enhancement imposed by the sentencing court because the fraudulent return scheme created a tax loss of at least \$29,000, and because the defendant was unable to show any evidence of any legitimate employment or source of income. *Id.* at 195. See also *United States v. Searan*, 2001 WL 832744, \*12 (6th Cir. July 25, 2001) (\$16,970 in gross income from tax service qualifies for enhancement where record reflect no non-tax fraud sources of income).

#### 5.03[2][d] **Business of Preparing or Assisting in the Preparation of Tax Returns**

The sentencing guideline governing the aiding, assisting, procuring, counseling, or advising of tax fraud also provides for a two-level enhancement of the offense level if "the defendant was in the business of preparing or assisting in the preparation of tax returns." §2T1.4(b)(1)(B). Prior to November 1, 1993, now-deleted §2T1.4(b)(3) contained this enhancement. USSG App. C, Amend. 491. This enhancement applies to defendants "who regularly prepare or assist in the preparation of tax returns for profit." §2T1.4, comment. (n.2).

This enhancement "does not, by language or logic, purport to focus only on persons for whom tax-return preparation is a primary business." *United States v. Phipps*, 29 F.3d 54, 56 (2d Cir. 1994). Likewise, this enhancement is not limited to defendants who "hang out a shingle" as professional tax return preparers. *United States v. Welch*, 19 F.3d 192, 196 (5th Cir. 1994) (upholding imposition of enhancement when defendant, who argued that his primary occupation was as a sports agent, showed no other gainful employment, filed five fraudulent tax returns for four clients over span of three years, and once misrepresented himself as a CPA). Nor is the enhancement limited to only those tax preparers with a legitimate tax preparation business who commit tax fraud. *United States v. Aragbaya*, 234 F.3d 1101, 1106-07 (9th Cir. 2000) (upheld application of 2T1.4(b)(1)(B) enhancement to defendant whose tax preparation business consisted solely of preparing fictitious tax returns). Rather, the focus of this enhancement is on whether the defendant "regularly" prepared or assisted in the preparation of tax returns for profit.

*Phipps*, 29 F.3d at 56. Accordingly, the sentencing court may impose this enhancement if the defendant's tax-return preparation activity was not occasional or sporadic, and if the defendant received payment for his services. *Id.*; *but cf. Welch*, 19 F.3d at 196 n.8 (observing that enhancement under §2B1.2(b)(3)(A), applicable to defendants in the business of receiving and selling stolen property, may apply even if conduct at issue was not prolonged or sustained, depending upon size and sophistication of operation). Further, and because this provision "was intended, in part, to reach paid preparers whose activities are sufficiently extensive to expose the government to the risk of loss of significant revenues," the term "regularly" does not mean necessarily "year-round, especially when dealing with a business so clearly seasonal as the filing of personal income tax returns." *Phipps*, 29 F.3d at 56 (upholding imposition of enhancement when defendant prepared at least 155 fraudulent tax returns over period of five or six consecutive years for fee of \$90 to \$200 per return).

Finally, this enhancement may apply even though the sentencing court also applies an enhancement under §2T1.4(b)(2) for use of sophisticated means. *United States v. Hunt*, 25 F.3d 1092, 1098 (D.C. Cir. 1994). This enhancement cannot apply, however, if the sentencing court applies an enhancement under §3B1.3 for abuse of position of trust or use of special skill. §2T1.4, comment. (n.2); *United States v. Young*, 932 F.2d 1510, 1514 n.4 (D.C. Cir. 1991).

#### 5.03[2][e] Planned or Threatened Use of Violence

The sentencing guideline governing conspiracies to impede, impair, obstruct or defeat a tax, in violation of 18 U.S.C. §371, provides for a four-level enhancement of the offense level "[i]f the offense involved the planned or threatened use of violence to impede, impair, obstruct or defeat the ascertainment, computation, assessment, or collection of revenue." §2T1.9(b)(1). Section 2T1.9 includes this enhancement because of the potential danger which tax fraud conspiracies may pose to law enforcement agents and the public. §2T1.9, comment. (backg'd). Although there appears to be extremely limited case law regarding this provision, the Eleventh Circuit has upheld an enhancement under §2T1.9(b)(1) in a case in which the defendant and his brother threatened a witness with a gun during the course of a conspiracy to evade income taxes. *See United States v. Pritchett*, 908 F.2d 816, 824 (11th Cir. 1990).

#### 5.03[2][f] Encouragement of Others to Violate Tax Code

The guideline governing conspiracies to impede, impair, obstruct or defeat a tax, in violation of 18 U.S.C. §371, also provides for a two-level enhancement of the offense level "[i]f the conduct was intended to encourage persons other than or in addition to co-conspirators to violate the internal revenue laws or impede, impair, obstruct, or defeat the ascertainment, computation, assessment, or collection of revenue." §2T1.9(b)(2). The application notes to §2T1.9 explain that this provision "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)." §2T1.9, comment. (n.4). The sentencing court should not apply this enhancement, however, if an adjustment is applied under §2T1.4(b)(1), which provides an enhancement for a defendant who derived a substantial portion of his income from a tax fraud scheme, or for a defendant who was in the business of preparing or assisting in the preparation of tax returns. §2T1.9(b)(2).

This provision apparently applies even if the persons encouraged to break the tax code by the defendant are government agents. In *United States v. Sileven*, 995 F.2d 962 (8th Cir. 1993), the Eighth Circuit held that the district court did not clearly err by enhancing the defendant's sentence under §2T1.9(b)(2) because the evidence indicated that the defendant through his actions and words repeatedly encouraged two other individuals to hide income.

*Id.* at 970. Although the status of the other individuals whom the defendant had encouraged was not an issue on appeal, the facts of the case indicate that these individuals (one individual and one IRS agent) were acting at the direction of the IRS. *Id.* at 964. Further, this provision applies when the defendant simply encourages others to disguise the defendant's own tax status. *United States v. Rabin*, 986 F.Supp. 887, 890-91 (D.N.J. 1997)(defendant encouraged girlfriend and attorney to hide defendant's income).

#### 5.04 RELEVANT CONDUCT

The provisions of USSG §1B1.3 permit a sentencing court to consider all of a defendant's relevant conduct in determining the base offense level, specific offense characteristics and Chapter Three adjustments. That provision specifically authorizes a court to consider "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." USSG §1B1.3(a)(1)(A). The court may additionally consider "in the case of a jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." USSG §1B1.3(a)(1)(B). These acts may have "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." USSG §1B1.3(a)(1). Moreover, solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts (tax offenses among others), all acts and omissions of the sort described in (a)(1) that were part of the same course of conduct or common scheme or plan as the offense of conviction should be grouped. USSG § 1B1.3(a)(2). See also USSG §§ 1B1.3(a)(3) and (4).

Generally, the government bears the burden of persuasion on the issue of relevant conduct by a preponderance of the evidence. USSG §6A1.3 comment.; *United States v. Watts*, 519 U.S. 148, 156 (1997); *United States v. De La Rosa*, 922 F.2d 675, 679 (11th Cir. 1991). Note, however, that the Supreme Court has specifically left open the issue of whether under exceptional circumstances, in which the sentencing enhancement was "a tail which wags the dog of the substantive offense," due process might require the relevant conduct to be proven by clear and convincing evidence. *Watts*, 519 U.S. at 156-57.

The Guidelines' relevant conduct provisions are consistent with the long-standing principle that "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Williams v. New York*, 337 U.S. 241, 246 (1949); accord *Witte v. United States*, 515 U.S. 389, 402 (1995)("very roughly speaking, [relevant conduct] corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment"), quoting *United States v. Wright*, 873 F.2d 437, 441 (1st Cir. 1989)(Breyer, J.).

This principle was codified at 18 U.S.C. § 3661 which provided:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C. § 3661; *Watts*, 519 U.S. at 152. Thus, "[a]s a general proposition a sentencing judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Id.* The commentary to Section 1B1.3 specifically provides that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." USSG §3B1.3

comment. (backg'd.); *Id.*

A sentencing court may consider acquitted conduct without running afoul of the Double Jeopardy Clause, which "prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." *Witte*, 515 U.S. at 389, quoting *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938). The Supreme Court found that sentencing enhancements "do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime." *Watts*, 519 U.S. at 154; *Witte*, 515 U.S. at 402-03. The Court based its decision on the premise that "an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." *Watts*, 519 U.S. at 156, citing *Dowling v. United States*, 493 U.S. 342, 349 (1990). See also *United States v. Averi*, 922 F.2d 765, 766 (11th Cir. 1991).

A sentencing court may also rely on conduct which occurred outside the statute of limitations. *United States v. Williams*, 217 F.3d 751, 754 (9th Cir.), cert. denied, 121 S.Ct. 503 (2000); *United States v. Valenti*, 121 F.3d 327, 334 (7th Cir. 1997); *United States v. Behr*, 93 F.3d 764 (11th Cir. 1996); *United States v. Silkowski*, 32 F.3d 682, 687 (2d Cir. 1994); *United States v. Neighbors*, 23 F.3d 306, 310-11 (10th Cir. 1994); *United States v. Pierce*, 17 F.3d 146, 150 (6th Cir. 1994); *United States v. Wishnefsky*, 7 F.3d 254, 256-57 (D.C. Cir. 1993); *United States v. Lokey*, 945 F.2d 825, 840 (5th Cir. 1991).

Additionally, a sentencing court may rely on uncharged conduct or charges which have been dismissed. *United States v. Bove*, 155 F.3d 44, 48 (2d Cir. 1998)(relevant conduct "clearly encompasses both charged and non-charged conduct"); *United States v. Georges*, 146 F.3d 561, 562 (8th Cir. 1998)(court included as relevant conduct deposit of loan repayment to a personal account and deduction of loan as these acts were inextricably tied to long pattern of conduct to conceal income); *Valenti*, 121 F.3d at 334; *United States v. Noske*, 117 F.3d 1053, 1060 (8th Cir. 1997); *United States v. Fine*, 975 F.2d 596, 602-03 (9th Cir. 1992)(en banc); *United States v. Johnson*, 971 F.2d 562, 576 n.10 (10th Cir. 1992)(funds associated with uncharged instances of money laundering can be added in to determine the offense level under §2S1.1 if those acts are within the scope of relevant conduct under §1B1.3(a)(2)). It is also 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).

The Guidelines also permit a defendant to be sentenced for acts committed by others during the course of jointly undertaken criminal activities when those acts were in furtherance of the activity and reasonably foreseeable. USSG §1B1.3(a)(1)(B). *United States v. Guerra*, 113 F.3d 809, 819 (8th Cir. 1997); *United States v. House*, 110 F.3d 1281, 1284-85 (7th Cir. 1997) (all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity attributable to defendant found to have reasonably foreseen the scope of the conspiracy); *United States v. Lorenzo*, 995 F.2d 1448, 1460 (9th Cir. 1993); *Johnson*, 971 F.2d at 574-75; In *United States v. Logan*, the Sixth Circuit found that fraudulent claims submitted by co-conspirators are correctly included as relevant conduct when determining the total loss even if the claims were not charged in the indictment. 250 F.3d 350, 371-72 (6th Cir. 2001).

The Guidelines themselves note that "[b]ecause a count may be broadly worded and include the conduct of many participants over a substantial period of time, the scope of the jointly-undertaken criminal activity is not necessarily the same for every participant." USSG §1B1.3 comment n.1 (1991). This application note has since been incorporated into later versions of the Guidelines. The relevant inquiry focuses upon the scope of criminal activity agreed upon by the defendant. *United States v. Ladum*, 141 F.3d 1328, 1346 (9th Cir. 1998) (inquiry requires determination of the scope of the

specific conduct and objects embraced by the defendant's agreement). The *Ladum* court noted that the principles and limits of criminal liability are not always the same as the principles and limits of sentencing accountability. Therefore, the focus is on specific acts and omissions for which defendant is accountable in determining the applicable guideline range, which requires "a determination of the scope of the criminal activity the particular defendant agreed to undertake." *Id.* (citation and punctuation omitted). The Second Circuit found that under Section 1B1.3(a)(1), a defendant "may be held accountable for (i) any tax evasion in which he had a direct personal involvement, and (ii) as to jointly undertaken criminal activity, any reasonably foreseeable tax losses." *United States v. Martinez-Rios*, 143 F.3d 662, 674 (2d Cir. 1998)(punctuation and citation omitted). The "reasonable foreseeability" requirement "applies only to the conduct of others." *Id.*

#### 5.05 ROLE IN THE OFFENSE

The guidelines authorize 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 court may enhance the offense level by up to four levels upon a finding that the defendant played a leadership role. USSG §3B1.1. Upon a finding that a defendant was a "minimal" or "minor" participant in the offense, the court may reduce a defendant's offense level by up to four levels. USSG §3B1.2. If the court finds that the defendant abused a position of public or private trust, or used a special skill, in order to significantly facilitate the commission or concealment of the offense, the court may enhance the defendant's offense level by two levels. USSG §3B1.3.

Reflecting a November 1, 1990 amendment, the introductory commentary to Chapter 3, Part B declares that "[t]he determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), i.e., all conduct included under §1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction." A sentencing court therefore may consider uncharged relevant conduct, or even relevant conduct underlying an acquitted charge, when determining whether to adjust a defendant's offense level on the basis of his role in the offense. See *United States v. Watts*, 519 U.S. 148, 151-57 (1997)(per curiam)(Section 1B1.3 permits sentencing court to determine applicable guideline range by relying upon uncharged conduct or conduct underlying acquitted charges, so long as conduct has been proven by preponderance of the evidence); see also *United States v. Ramos-Oseguera*, 120 F.3d 1028, 1039 (9th Cir. 1997) (under *Watts*, court may enhance base offense level for aggravated role in the offense by relying upon conduct underlying count for which jury acquitted defendant); *United States v. Thomas*, 114 F.3d 228, 261-62 (D.C. Cir. 1997)(holding the same). Note, however, that at least one opinion issued subsequent to the decision of the Supreme Court in *Watts* has ruled, in apparent defiance of the dictates of *Watts*, that an abuse of trust enhancement may rely only upon conduct involved in an offense of conviction. See *United States v. Barakat*, 130 F.3d 1448, 1455 (11th Cir. 1997); but see *United States v. Cianci*, 154 F.3d 106, 111 (3d Cir. 1998)(declining to follow *Barakat* and holding that an abuse of trust enhancement may rest upon facts outside the offense of conviction).

The Third and Tenth Circuits have found that the amended introductory commentary to Subchapter 3, Part B constituted a substantive change, thus permitting a sentencing court to consider relevant 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 (3d Cir. 1992); *United States v. Johnson*, 971 F.2d 562, 577 (10th Cir. 1992). Other circuits, however, have found that courts may consider relevant conduct which occurred before passage of the amendment because the amended commentary represents only a clarification of preexisting law. *United States v. Lanese*, 937 F.2d 54, 57 (2d Cir. 1991); *United States v.*

*Lillard*, 929 F.2d 500, 503 (9th Cir. 1991); *United States v. Rodriguez*, 925 F.2d 107, 111 (5th Cir. 1991).

#### 5.05[1] Aggravating 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 term "participant" refers to a person who is criminally responsible for the commission of the offense; the term includes persons not convicted of an offense, but excludes undercover law enforcement officers. USSG §3B1.1, comment. (n.1). When assessing whether an organization is "otherwise extensive," courts should consider all persons involved during the course of the entire offense, including unwitting outsiders used by the criminal participants. USSG §3B1.1, comment. (n.3); *United States v. Randy*, 81 F.3d 65, 68-69 (7th Cir. 1996). The particular title of a defendant does not determine whether he acted as an organizer or leader, as opposed to a mere manager or supervisor. USSG §3B1.1, comment. (n.4). Rather, courts should consider the following factors when deciding whether a defendant was an organizer or leader:

[T]he exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

*Id.* The purpose of §3B1.1 is to account for the relative responsibilities of the participants in a scheme, and to deter those persons who are most likely to present a greater danger to the public and/or recidivate. USSG §3B1.1, comment. (backg'd). An appellate court will review factual findings regarding the applicability of this enhancement for clear error only. *United States v. Powell*, 124 F.3d 655, 667 (5th Cir. 1997).

Section 3B1.1 defines "organizer or leader" broadly, and a defendant may have acted as an organizer even if he did not control others in the organization directly. *United States v. Morris*, 18 F.3d 562, 569 (8th Cir. 1994). See also *United States v. Ervasti*, 201 F.3d 1029, 1041 (8th Cir. 2000) ("While control of other participants is an important factor, section 3B1.1 focuses on the 'relative responsibility within a criminal organization.'") (citations omitted). Further, there can be more than one organizer in a criminal operation. USSG §3B1.1, comment. (n.4); *Morphew v. United States*, 909 F.2d 1143, 1145 (8th Cir. 1990). Likewise, a defendant may be a manager or supervisor even if he is not at the top of a criminal scheme. *United States v. Goldberg*, 105 F.3d 770, 777 (1st Cir. 1997). Moreover, a defendant may qualify for a §3B1.1(b) enhancement so long as he had a managerial or supervisory role in illegal conduct which involved five or more persons; the defendant does not have to manage or supervise five other persons directly. *United States v. Kraig*, 99 F.3d 1361, 1369-70 (6th Cir. 1996). Even if the defendant did not have an aggravating role during the commission of the offense, he still may qualify for an enhancement if he assumed a dominant role during a later cover-up. *United States v. Mankarious*, 151 F.3d 694, 710 (7th Cir. 1998).

Courts often have upheld the application of an aggravating role enhancement in cases involving tax crimes. See *Ervasti*, 201 F.3d at 1041-42 (upholding 3B1.1(c) enhancement for husband defendant who "was not just [company's] CEO in title, he was its leader in all respects"); *Mankarious*, 151 F.3d at 710 (upholding §3B1.1(c) enhancement for defendant who directed and paid underling to conceal scheme to commit money laundering, wire fraud, and filing of false tax returns); *Powell*, 124 F.3d at 667 (distributor of gasoline and diesel fuel, convicted of evading federal fuel excise taxes, qualified for §3B1.1(c) enhancement because he



supervised in-house accountant's work on false tax returns regarding fuel sales); *United States v. Madoch*, 108 F.3d 761, 767 (7th Cir. 1997)(CPA, convicted of corruptly endeavoring to obstruct government from collecting taxes, qualified for §3B1.1(a) enhancement because five other individuals helped him further scheme, according to his directions); *Goldberg*, 105 F.3d at 777 (defendant, convicted of conspiring to defraud the IRS and aiding the filing of false tax returns, qualified for §3B1.1(c) enhancement; although bookkeeper whom defendant supervised was not a culpable participant, defendant also managed receipt of false tax documents by straw employees); *Kraig*, 99 F.3d at 1370 (lawyer, convicted of conspiring to defraud the IRS, qualified for §3B1.1(b) enhancement because he recruited lawyers and accountants to participate in scheme to conceal assets of client); *United States v. Brinkworth*, 68 F.3d 633, 641-42 (2d Cir. 1995)(defendant, convicted of filing false return, qualified for §3B1.1(c) enhancement because he directed and provided records to criminally responsible accountant); *United States v. Dijan*, 37 F.3d 398, 403-04 (8th Cir. 1994)(defendants, convicted of conspiring to bribe IRS agent, qualified for §3B1.1(a) enhancement because criminal activity involved more than five people, including indicted and unindicted coconspirators, and because decision to attempt bribe rested with defendants); *United States v. Leonard*, 37 F.3d 32, 37-39 (2d Cir. 1994)(corporate vice-president, convicted of conspiring to defraud the IRS, qualified for §3B1.1(b) enhancement because he organized and managed efforts of other employees to skim cash from corporation, even though he did so at the behest of another individual).

Finally, the guidelines explicitly state that a sentencing court may apply an aggravated role enhancement in addition to a §2F1.1(b)(2) enhancement for more than minimal planning. USSG §1B1.1, comment. (n. 4). Although the Sixth Circuit has ruled that cumulative enhancements for an aggravated role and more than minimal planning are impermissible, *United States v. Romano*, 970 F.2d 164, 167 (6th Cir. 1992), the Sixth Circuit was interpreting a version of the guidelines which did not contain the current provision, effective as of November 1, 1993, that the two enhancements are not mutually exclusive. Further, at least seven other federal circuits have recognized that sentencing courts may apply both enhancements simultaneously. *United States v. Michalek*, 54 F.3d 325, 334 n.14 (7th Cir. 1995)(collecting cases).

#### 5.05[2] Mitigating Role in the Offense

Section 3B1.2(a) provides that a court may reduce by four the offense level of a defendant who was "a minimal participant in any criminal activity." This reduction, which covers "defendants who are plainly among the least culpable of those involved in the conduct of a group," USSG §3B1.2, comment. (n.1), applies infrequently. USSG §3B1.3, comment. (n.2). For example, this reduction would apply to a defendant who participated in a very large drug smuggling operation by unloading part of a single marijuana shipment, or by once acting as a courier for a small amount of drugs. *Id.* Section 3B1.2(b) similarly provides that a court may reduce by two the offense level of a defendant who was "a minor participant in any criminal activity." Under §3B1.2(b), "a minor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal." USSG §3B1.3, comment. (n.3). A defendant whose role in the criminal activity was greater than "minimal," but less than "minor," may receive an intermediate reduction of three levels. USSG §3B1.2.

A defendant bears the burden of proving that he played only a minimal or minor role in the offense. *United States v. Searan*, 2001 WL 832744, \*11 (6th Cir. July 25, 2001); *United States v. Atanda*, 60 F.3d 196, 198 (5th Cir. 1995)(per curiam). When assessing whether a defendant qualifies for a mitigating role reduction, the sentencing court "must take into account the broad context of the defendant's crime." *Id.* A finding that a defendant did or did not have a minimal or minor role is reviewed for clear error because such a determination depends heavily upon the facts of the particular case. *Searan*, 2001 WL 832744, \*11; *United States v. Ladum*, 141 F.3d 1328, 1348 (9th Cir. 1998). A

defendant does not qualify for a mitigating role reduction simply because he is less culpable than other codefendants. *Ladum*, 141 F.3d at 1348 (upholding refusal to apply mitigating role reduction when defendant, although acquitted of false tax return charges, nonetheless played instrumental role in bankruptcy fraud scheme); *Atanda*, 60 F.3d at 198 n.1. Generally, a reduction for minimal participation is reserved for those individuals who play "a single, limited role in a very large organization." See *United States v. Tilford*, 224 F.3d 865, 869 (6th Cir. 2000) (quoting *United States v. Williams*, 940 F.2d 176, 180 (6th Cir. 1991)). Further, the mere presence of drugs in significant quantities is sufficient to deny a minimal role downward adjustment. *United States v. Murillo*, 2001 WL 754772, \*9 (9th Cir. July 6, 2001) (upholding denial of reduction for defendant who acted as repeat drug courier and possessed more than one million dollars worth of drugs at time of arrest). See also *United States v. Antonakeas*, 2001 WL 682370, \*11 (9th Cir. June 19, 2001) (upholding sentencing judge's determination "a supplier of kilogram quantities of cocaine on multiple occasions is not deserving of any downward adjustment").

A defendant who already has received a lower offense level because he has been convicted of an offense significantly less serious than his actual criminal conduct ordinarily cannot qualify for any mitigating role reduction. USSG §3B1.3, comment. (n.4). Likewise, a defendant cannot qualify for a reduction when his sentence rests upon criminal activity in which he actually participated, even though the defendant's role in a larger conspiracy may have been minor or minimal. *Atanda*, 60 F.3d at 199 (upholding refusal to apply mitigating role reduction when defendant was convicted of both filing a false claim for tax refund in own name, and participating in broad conspiracy to file false claims for tax refunds; although defendant's role in overall conspiracy was relatively small, his sentence was based only upon the tax loss arising out of the single false claim filed by defendant in his own name); *United States v. Lampkins*, 47 F.3d 175, 180-81 (7th Cir. 1995); *United States v. Lucht*, 18 F.3d 541, 555 (8th Cir. 1994).

#### 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 by two levels 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. Section 3B1.3, however, prohibits use of this enhancement when the base offense level or the specific offense characteristics of the guideline being applied already include an abuse of trust or special skill. Section 3B1.3 further indicates that an adjustment based upon an abuse of trust may accompany an additional adjustment based upon an aggravating role in the offense under USSG §3B1.1, but that an adjustment based solely upon the use of a special skill may not accompany an additional adjustment under USSG §3B1.1. An appellate court reviews *de novo* a sentencing court's interpretation of the meanings of the terms "position of trust" and "special skill," but reviews the sentencing court's application of those terms to the facts for clear error. *United States v. Noah*, 130 F.3d 490, 499 (1st Cir. 1997); *United States v. Bhagavan*, 116 F.3d 189, 192 (7th Cir. 1997); *United States v. Young*, 932 F.2d 1510, 1512 (D.C. Cir. 1991).

The guidelines define a position of "public or private trust" as "a position of public or private trust characterized by professional managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference)." USSG §3B1.3, comment. (n.1). For example, the enhancement would apply to a fraudulent loan scheme by a bank executive, but not to embezzlement by an ordinary bank teller. *Id.* The purpose of this enhancement is "to penalize defendants who take advantage of a position that provides them freedom to commit or conceal a difficult-to-detect wrong." *United States v. Koehn*, 74 F.3d 199, 201 (10th Cir. 1996). Courts assess whether a defendant occupied a position of trust from the perspective of the victim of the crime. *United States v. Guidry*, 199 F.3d 1150, 1159-60 (10th Cir. 1999); *United States v. Garrison*, 133 F.3d 831, 837 (11th Cir. 1998); *United States v. Ragland*, 72 F.3d 500, 502

(6th Cir. 1996). The concept of "trust" under USSG § 3B1.3 resembles the degree of discretion traditionally accorded a trustee or fiduciary. *Ragland*, 72 F.3d at 502-03.

Courts have applied the abuse of trust enhancement in a variety of circumstances. The Seventh Circuit has held that the majority shareholder of a corporation qualified for the abuse of trust enhancement when he used his position to divert corporate income in order to facilitate the crime of personal income tax evasion. *Bhagavan*, 116 F.3d at 193-94. Although the dissent in *Bhagavan* argued that the enhancement was inapplicable because the victims of the defendant's abuse of trust, the minority shareholders, were not the victims of the actual crime of conviction, tax evasion, *id.* at 194-95 (Cudahy, J., dissenting), the majority determined that "[i]t is enough that identifiable victims of Bhagavan's overall scheme to evade his taxes put him in a position of trust and that his position 'contributed in some significant way to facilitating the commission or concealment of the offense.'" *Id.* at 193 (quoting USSG § 3B1.3, comment. (n.1)); see also *United States v. Cianci*, 154 F.3d 106, 111-13 (3d Cir. 1998)(high-ranking corporate official facilitated crime of individual income tax evasion by abusing position of trust and diverting embezzled corporate property in exchange for kickbacks; enhancement was proper even though the victim of defendant's abuse of trust was not the victim of the offense of conviction).

In *United States v. Lowder*, 5 F.3d 467 (10th Cir. 1993), the defendant, a certified public accountant, was convicted in part of mail fraud; this conviction was based on misrepresentations made by the defendant when soliciting his tax clients for investments, which he then misused for personal expenditures. The Tenth Circuit upheld an enhancement for abuse of trust, explaining that the defendant "was a CPA who provided tax and financial advice to elderly and unsophisticated clients. He advised them to place their money with him and promised them security. As president of the corporations he was free to spend that money, without oversight." *Id.* at 473. The *Lowder* court further stated that factors relevant to whether a defendant abused a position of trust include the "defendant's level of knowledge and authority, the level of public trust in defendant, and whether the abuse could be easily or readily noticed." *Id.*

In *United States v. Baker*, 200 F.3d 558 (8th Cir. 2000), the defendant, an insurance agent, was convicted of mail fraud, insurance theft, and making false statements to the government. Defendant represented to elderly clients that she would use their insurance premium payments to purchase insurance policies or annuities when she actually misused the money for personal expenses. *Id.* In upholding the abuse of trust enhancement, the Eighth Circuit stated that "ordinary commercial relationships do not invoke the ... enhancement" [citation omitted], but, in this case, "the issue is fact intensive because it turns on the precise relationship between defendant and her victims. *Id.* at 564. The *Baker* court stated that the defendant "was an insurance agent who persuaded her elderly clients to give her personal control over their premium payments and then misappropriated those monies." *Id.* It concluded that "a licensed insurance agent with control over client funds may occupy a position of private trust." *Id.*

Courts also have upheld application of the abuse of trust enhancement to bank officers who used their positions to facilitate the commission of crimes. *United States v. McCord*, 33 F.3d 1434, 1435 (5th Cir. 1994)(bank president convicted of misapplication of bank funds used position to arrange for bank funds to pay for installation of air conditioning unit at his home, and to arrange for false entries in bank records); *United States v. Morris*, 18 F.3d 562, 568 (8th Cir. 1994)(bank officer and director convicted of bank fraud and money laundering used position to approve payment of insufficient funds checks and conceal overdraft status of account). Likewise, law enforcement officers who use their positions to further or conceal their criminal activity may be subject to this enhancement. *United States v. Terry*, 60 F.3d 1541, 1545 (11th Cir. 1995)(deputy sheriff used office and patrol car to prevent police interception of his drug sales to undercover agent); *United States v. Duran*, 15 F.3d 131, 132-33 (9th Cir.1994)(per

curiam)(sheriff used office to embezzle funds seized during drug investigations). The Eleventh Circuit has upheld an abuse of public trust enhancement applied to a grand juror who provided information to an individual under grand jury investigation for drug smuggling and money laundering. *United States v. Brenson*, 104 F.3d 1267, 1287-88 (11th Cir. 1997).

Because §3B1.3 states that the abuse of trust enhancement cannot apply when an abuse of trust is included in the base offense level or specific offense characteristic, some opinions have held that this enhancement cannot apply in the context of certain fraud crimes. See *Garrison*, 133 F.3d at 842 (owner and chief executive officer of home health care provider, convicted of submitting fraudulent cost reports for Medicare reimbursements, could not receive abuse of trust enhancement based upon same conduct underlying conviction); *United States v. Broderson*, 67 F.3d 452, 456 (2d Cir. 1995)(vice-president of company with government contract, convicted of misrepresenting to the government that his company had complied with applicable regulations, could not receive abuse of trust enhancement because the base offense level for his fraud conviction already included any abuse of trust); but cf. *United States v. Chimal*, 976 F.2d 608, 613 (10th Cir. 1992)(affirming abuse of trust enhancement in embezzlement case, even after acknowledging that "embezzlement by definition involves an abuse of trust"). Similarly, the Second Circuit has observed that the abuse of trust enhancement does not apply simply because the defendant violated a statutory duty to provide accurate information to the government; for example, the abuse of trust enhancement does not apply to every taxpayer who files a false tax return. *Broderson*, 67 F.3d at 456.

The guidelines define a "special skill" 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). A special skill enhancement may apply even if the defendant is self-taught or lacks either formal education or professional stature. *Noah*, 130 F.3d at 500. "[A] skill can be special even though the activity to which the skill is applied is mundane. The key is whether the defendant's skill elevates him to a level of knowledge and proficiency that eclipses that possessed by the general public." *Id.* The special skill enhancement "requires only proof that the defendant's use of that skill makes it significantly 'easier' for him to commit or conceal the crime." *United States v. Atkin*, 107 F.3d 1213, 1119-20 (6th Cir. 1997)(upholding special skill enhancement when lawyer, convicted in part of obstruction of justice, used position in order to facilitate and conceal his attempt to bribe a judge). A special skill enhancement may not be based on a coconspirator's actions. *United States v. Gormley*, 201 F.3d 290, 295 (4th Cir. 2000). A sentencing court may apply a special skill enhancement even though it also is applying an additional enhancement either for use of sophisticated means, under USSG §2T1.3(b)(2), or for more than minimal planning, under USSG §2F1.1(b)(2)(A). *United States v. Rice*, 52 F.3d 843, 850-51 (10th Cir. 1995).

The First Circuit upheld the application of a special skill enhancement to a professional tax return preparer convicted of making false claims for refund through the filing of false electronic returns. *Noah*, 130 F.3d at 500. In *Noah*, the defendant unsuccessfully argued that the enhancement was inapplicable because the preparation and electronic filing of tax returns are relatively simple tasks, and because he lacked formal training. *Id.* The First Circuit relied upon the holding of the Second Circuit in *United States v. Fritzson*, 979 F.2d 21, 22 (2d Cir. 1993), in which the defendant, an accountant convicted of a tax fraud conspiracy, disputed the propriety of the enhancement by claiming that even people without his special skills could prepare the Forms W-2 and W-3 at issue. *Fritzson*, 979 F.2d at 22. Rejecting this claim, the *Fritzson* 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, exceeds the knowledge of the average person." *Id.* at 22-23; see also *Rice*, 52 F.3d at 850 (accountant convicted of making false claims for tax refunds and filing false tax returns qualified for special skill enhancement).

In *United States v. Wright*, 211 F.3d 233 (5th Cir.), cert. denied, 121 S.Ct. 274 (2000), the defendant, a Certified Public Accountant and tax attorney, received an obstruction of justice enhancement. In upholding the enhancement, the Fifth Circuit stated that while the defendant's contribution to the scheme was not particularly sophisticated, the defendant did use his special skills to prepare legal documents which furthered the conspiracy. *Id.* at 238.

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 convicted pursuant to 26 U.S.C. § 7206(2). USSG §2T1.4, comment. (n.3); *United States v. Young*, 932 F.2d 1510, 1514 n.4 (D.C. Cir. 1991). This is because the specific offense characteristics of §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); *Young*, 932 F.2d at 1514 n.4.

#### 5.06 OBSTRUCTION OF JUSTICE

The guidelines require a two-level increase in the offense level when the court finds that a defendant "willfully obstructed or impeded, or attempted to obstruct or impede the administration of justice during the investigation or prosecution of his offense." USSG §3C1.1. The commentary to Section 3C1.1 provides a non-exhaustive list of conduct which constitutes obstruction of justice. Case law provides a variety of scenarios which justify an obstruction of justice enhancement.

The obstruction guideline was amended effective November 1, 1998 to include this application note:

This adjustment applies if the defendant's obstructive conduct (A) occurred during the course of the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) an otherwise closely related case, such as that of a co-defendant.

USSG §3C1.1 comment. (n.1). The purpose was to clarify both the term "instant offense" and the temporal element of the obstruction guideline. USSG App. C, amend. 581 (1998).

Section 3C1.1 requires specific intent to obstruct justice. *United States v. Henderson*, 58 F.3d 1145, 1153 (7th Cir. 1995). The government bears the burden of proving that the enhancement is warranted by a preponderance of the evidence. *United States v. Parrott*, 148 F.3d 629, 634 (6th Cir. 1998); *United States v. Ewing*, 129 F.3d 430, 434 (7th Cir. 1997) (citation omitted). The Section does not require proof that the defendant's conduct actually prejudiced or impacted the case. *Id.* Application note 1 to § 3C1.1 provides for a denial of guilt exception. USSG § 3C1.1 comment (n.1); *United States v. Gormley*, 201 F.3d 290, 294 (4th Cir. 2000) (holding that defendant was not entitled to exception because his statements went beyond merely denying guilt and implicated his taxpayer clients in scheme to defraud).

The first behavior which is defined as obstruction of justice is "threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so." USSG § 3C1.1 comment. (n.4(a)). See *United States v. West*, 58 F.3d 133, 137-38 (5th Cir. 1995) (holding that the court's finding may properly be based on uncorroborated hearsay evidence). It is obstruction of justice for a defendant to tell a witness to lie or confirm a common story. *United States v. Emerson*, 128 F.3d 557, 563 (7th Cir. 1997); *United States v. Friend*, 104 F.3d 127, 130 (7th Cir. 1997); *United States v. Hollis*, 971 F.2d 1441, 1460 (10th Cir. 1992).

"[C]ommitting, suborning, or attempting to suborn perjury" is likewise

considered conduct warranting an obstruction of justice enhancement. USSG § 3C1.1 comment (n. 4(b)). The Supreme Court has held that when a defendant perjures himself on the stand, enhancing the defendant's offense level for obstruction of justice is warranted. *United States v. Dunnigan*, 507 U.S. 87, 96 (1993); accord *United States v. Fitzgerald*, 232 F.3d 315, 321 (2d Cir. 2000) (concluding that obstruction enhancement was required by defendant's perjury at both trial and sentencing); *United States v. Tandon*, 111 F.3d 482, 490 (6th Cir. 1997). Noting that "not every accused who testifies at trial and is convicted will incur an enhanced sentence under § 3C1.1 for committing perjury," the sentencing court must be satisfied that the inaccurate testimony was not due to confusion, mistake, or faulty memory. *Dunnigan*, 507 U.S. at 95. Therefore, in applying the obstruction enhancement resulting from a defendant's perjury, the trial court must make findings on the record which encompass all of the factual predicates for a finding of perjury. *Dunnigan*, 507 U.S. at 95. See also *United States v. Logan*, 250 F.3d 350, 374-75 (6th Cir. 2001); *United States v. Mounkes*, 204 F.3d 1024, 1028-30 (10th Cir.), cert. denied, 530 U.S. 1230 (2000). 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*, 507 U.S. at 94. 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). The obstruction guideline was amended in 1997 to clarify that there is no heightened standard of proof when making an adjustment for perjury, merely that "the court should be mindful that not all inaccurate testimony or statements reflect a willful attempt to obstruct justice." USSG App. C, Amend. 566 (1997).

Another scenario which is specifically delineated by the commentary is "producing or attempting to produce a false, altered or counterfeit document or record during an official investigation or judicial proceeding." USSG § 3C1.1 comment. (n.4(c)). But see *Parrott*, 148 F.3d at 635, in which the court found that the enhancement was not warranted because there was no evidence from which to conclude that the defendant submitted the false documents for the purpose of impeding the government's investigation.

The guidelines also identify "destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding . . . or attempting to do so" as evidence obstruction. USSG § 3C1.1 comment (n.4(d)). The Ninth Circuit found that transfer of \$280,000 to Switzerland three weeks after the defendant learned of the criminal investigation warranted the obstruction enhancement. *United States v. Shetty*, 130 F.3d 1324, 1334-35 (9th Cir. 1997) ("[I]n a tax case, money is material evidence.").

A defendant also obstructs justice by "providing materially false information to a probation officer in respect to a presentence . . . investigation for the court." USSG § 3C1.1, comment. (n. 4(h)). The Guidelines define material evidence as information which, "if believed, would tend to influence or affect the issue under determination." USSG § 3C1.1, comment. (n.6). See *United States v. Martinez-Rios*, 143 F.3d 662, 678 (2d Cir. 1998) (false information in affidavit for sentencing). "The threshold for materiality . . . is 'conspicuously low'." See *Gormley*, 201 F.3d at 294 (internal citations omitted). A defendant's failure to provide 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). Accord *United States v. Romer*, 148 F.3d 359, 372-73 (4th Cir. 1998). In *Romer*, the appellate court found that the sentencing court does not need to make an express finding of materiality if it can be fairly implied from the court's statements during sentencing. *Id.* at 372. Note that the amendments effective November 1, 1998 "establish that lying to a probation officer about drug use while released on bail does not warrant obstruction of justice under § 3C1.1." USSG § 3C1.1

Section 3C1.1 also advises that it is obstruction of justice to provide a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense. USSG § 3C1.1 comment. (n. 4(g)) (emphasis added); *United States v. Emerson*, 128 F.3d at 563; see also *United States v. Baker*, 200 F.3d 558, 561-62 (8th Cir. 2000). Interpreting the plain language of the section, the First Circuit found "that an enhancement may be made for unsworn, false statements to law enforcement officers only if the government shows that the statements significantly obstructed or impeded the official investigation or prosecution of the offense." *United States v. Isabel*, 980 F.2d 60, 61-62 (1st Cir. 1992); (noting that pre-1990 guidelines inaccurately appeared to permit the enhancement for a deliberate, material lie even if the lie was unsuccessful in impeding the investigation). accord *United States v. Fiala*, 929 F.2d 285, 290 (7th Cir. 1991).

An obstruction of justice enhancement is appropriate when a defendant provides "materially false information to a judge or magistrate." USSG § 3C1.1 comment (n. 4(f)); *United States v. Hernandez-Ramirez*, 2001 WL 687001 (9th Cir. June 20, 2001). In *Hernandez-Ramirez*, the Ninth Circuit held that submission of a false financial affidavit to a magistrate judge for the purpose of obtaining counsel is sufficiently related to the offense of conviction (violation of the United States Tax Code) to support a § 3C1.1 enhancement. *Id.* at \*2.

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 tax evasion resulting from the failure to report \$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." *Coyne*, 4 F.3d at 114. See also *United States v. Powell*, 124 F.3d 655, 666-67 (5th Cir. 1997) (submitting false documents in IRS audit, submitting false documents, and attempting to suborn perjury); *United States v. August*, 984 F.2d 705, 714 (6th Cir. 1992).

Note that application note 4 to USSG § 3E1.1 states that "[c]onduct resulting in an enhancement under § 3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply." USSG § 3E1.1 comment. (n.4).

The Sixth Circuit has held that a district court must review the evidence and set forth findings independent of those contained in the presentence investigation report when applying an obstruction of justice enhancement. *United States v. Middleton*, 246 F.3d 825, 847 (6th Cir. 2001). When a district court fails to do so, the reviewing court must vacate the sentence and remand the case for resentencing. *Id.*

---

## 5.07 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). Grouping is a difficult area, and the guideline section outlining the rules for



grouping "is not a model of clarity." *United States v. Gist*, 101 F.3d 32, 34 (5th Cir. 1996).

Section 3D1.2 identifies four alternative methods to determine what constitutes "substantially the same harm:" (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 embodies conduct that is treated as a specific offense characteristic in the guideline applicable to another of the counts; or (d) when the offense level is determined largely on the basis of the total amount of harm or loss. USSG § 3D1.2. The methods are alternative and any one or more may be applied. *United States v. Bove*, 155 F.3d 44, 49 (2d Cir. 1998).

Thus, subsections (a) and (b) provide for grouping when two offenses are sufficiently interrelated and entail substantially the same harm when they involve the same victim within the meaning of Section 3D1.2. The term "victim" is defined by Application Note 2:

The term "victim" is not intended to include indirect or secondary victims. Generally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim. For offenses in which there are no identifiable victims . . . the "victim" for purposes of subsections (a) and (b) is the societal interest that is harmed. In such cases, the counts are grouped together when the societal interests that are harmed are closely related.

USSG §3D1.2, comment. (n.2). Thus, in victimless crimes, "the grouping decision must be based primarily upon the nature of the interest invaded by each offense." *United States v. Gallo*, 927 F.2d 815, 824 (5th Cir. 1991)(money laundering and drug trafficking are not closely related); see *United States v. Harper*, 972 F.2d 321, 322 (11th Cir. 1992); but see, *United States v. Lopez*, 104 F.3d 1149, 1150 (9th Cir. 1997) (so-called victimless crimes are treated as involving the same victim when the societal interests that are harmed are closely related and societal interests harmed by money laundering and drug trafficking are closely related).

Subsection 3D1.2(c) provides that when conduct that represents a separate count is also a specific offense characteristic or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor. This provision is designed to prevent "double counting." USSG § 3D1.2, comment. (n.5). Grouping under this section is only proper, however, when the offenses are closely related. *Id.* Nevertheless, this provision will apply even where the offenses involve different harms or societal interests. *Id.*

Subsection 3D1.2(d) applies to crimes where "the guidelines are based primarily on quantity or contemplate continuing behavior." USSG §3D1.2, comment. (n.6). Section 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 provides a list of offenses specifically excluded from the operation of that subsection. In other words, Section 3D1.2(d) "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); accord *United States v. Williams*, 154 F.3d 655, 656 (6th Cir. 1998) ("Subsection (d) further divides Guidelines sections covering classes of harms more or less susceptible to aggregation into three broad categories--those which 'are to be grouped,' those 'specifically excluded' from aggregated treatment and those subject to grouping on a 'case by case' basis"). Note that there is no automatic grouping merely because the counts are on the "to be grouped" list. *Seligsohn*, 981 F.2d at 1425; see *Williams*, 154 F.3d at 56-57; *United States v. Taylor*, 984 F.2d 298, 303 (9th Cir. 1993); *United States v. Johnson*, 971 F.2d 562, 576 (10th Cir. 1992). Generally, courts have not grouped counts when the applicable guidelines

sections measure the harm differently. *Williams*, 154 F.3d at 56-57. Application note 7 expressly states that the methods are alternative and that any one or more may be applied. *Bove*, 155 F.3d at 49.

Thus, tax evasion and fraud and conversion offenses have been grouped under USSG § 3D1.2(d) because they "measure the harm by reference to the amount of monetary loss" and they are offenses of the same general type due to the "unity of the offense tables for tax evasion, fraud, and conversion." *United States v. Fitzgerald*, 232 F.3d 315, 319-20 (2d Cir. 2000). And 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). 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). The Fourth Circuit has permitted grouping of antitrust and tax conspiracy offenses. *United States v. Romer*, 148 F.3d 359, 364 (4th Cir. 1998).

The Ninth Circuit held that conspiracy to distribute drugs and money laundering counts should be grouped because they harmed the same societal interests. *Lopez*, 104 F.3d at 1150. The *Lopez* court based its holding on the legislative history of the Anti-Drug Abuse Act of 1986 which demonstrated that Congress' primary purpose in prohibiting money laundering was "to add a weapon to the arsenal against drug trafficking and to combat organized crime." *Id.* at 1151. The court further noted that Most Frequently Asked Questions About the Sentencing Guidelines 20 (7th ed. 1994) stated that "[B]ecause money laundering is a type of statutory offense that facilitates the completion of some other underlying offense, it is conceptually appropriate to treat a money laundering offense as 'closely intertwined' and groupable with the underlying offense." *Id.*

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). *But see* USSG § 3D1.2, comment. (n.5). The Third Circuit has held that grouping is inappropriate in a case involving both fraud and tax evasion. *United States v. Vitale*, 159 F.3d 810 (3rd Cir. 1998) (wire fraud and tax evasion do not group); *United States v. Astorri*, 923 F.2d 1052, 1056 (3d Cir. 1991); *accord Seligsohn*, 981 F.2d at 1425. *But see United States v. Haltom*, 113 F.3d 43, 45-47 (5th Cir. 1997), which distinguishes *Astorri* and finds that mail fraud and tax evasion counts had to be grouped where the base offense level for tax evasion was increased because income was derived from criminal activity.

Question 89 in the *Questions Most Frequently Asked About the Guidelines* (1993 Edition) addressed the question of whether tax evasion and another count embodying criminal conduct that generated the income on which tax was evaded group. The Commission responded:

Yes. The counts can be grouped under § 3D1.2(c). Grouping rule (c) instructs that counts are to be grouped when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts. Specific offense characteristic (b)(1) of 2T1.1 (Tax Evasion) provides an enhancement if the defendant failed to report or to correctly identify the source of income exceeding \$10,000 in any year from criminal activity. Tax evasion is always grouped with the underlying offense according to rule (c), regardless of whether (b)(1) was actually applied.

The Second Circuit held that violations of 26 U.S.C. § 7206(1), filing a false return, did not merge with conspiracy to structure financial transactions to evade reporting requirements in violation of 18 U.S.C. §

371. *Bove*, 155 F.3d at 50. The Second Circuit also 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. *Accord Williams*, 154 F.3d at 657 (when bankruptcy count charged a false oath or account filed under Title 11 of the United States Code, harm is measured in a different fashion than tax fraud); *United States v. Madoch*, 108 F.3d 761, 764 (7th Cir. 1997) (bankruptcy and fraud counts are grouped separately because they represent separate victims with separate harms).

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). 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 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.

The Sixth Circuit has held that Section 3D1.4, regarding multiple count adjustments, permits a court to apply the multiple count adjustment to counts arising from separate indictments. *United States v. Griggs*, 47 F.3d 827, 830-31 (6th Cir. 1995). The defendant in *Griggs* pled guilty to one count of each of two indictments. Relying on Section 5G1.2 discussing "Sentencing on Multiple Counts of Conviction," the *Griggs* court noted that a combined offense level must first be determined which incorporates the counts from the separate indictments. Only then is the court free to apply a sentence to multiple counts in a separate indictment. *Id.* Note that the First Circuit has affirmed a district court finding that counts from different indictments did not group because they were not "closely related" as defined in USSG §3D1.2. *United States v. Hernandez Coplin*, 24 F.3d 312, 319-20 (1st Cir. 1994).

---

## 5.08 ACCEPTANCE OF RESPONSIBILITY

### 5.08[1] Acceptance of Responsibility: In General

USSG §3E1.1(a) authorizes the district court to reduce a defendant's offense level by two levels "[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his offense . . . ." A defendant demonstrates acceptance of responsibility by:

- 1) truthfully admitting conduct comprising the offense, and truthfully admitting or not falsely denying any additional relevant conduct;
- 2) voluntarily terminating criminal conduct, or withdrawing from criminal associations;
- 3) voluntarily paying restitution prior to adjudication of guilt;
- 4) voluntarily surrendering to authorities promptly after committing the offense;
- 5) voluntarily assisting authorities in recovering fruits and instrumentalities of the offense;
- 6) voluntarily resigning from an office or position held while committing the offense;

- 7) making significant post-offense rehabilitation efforts; or
- 8) timely accepting responsibility.

USSG §3E1.1(a), comment. (n.1). The provision for a reduction of a defendant's sentence for acceptance of responsibility "merely formalizes and clarifies a tradition of leniency extended to defendants who express genuine remorse and accept responsibility for their wrongs." *United States v. Lancaster*, 112 F.3d 156, 158 (4th Cir. 1997), quoting *United States v. Crawford*, 906 F.2d 1531, 1534 (11th Cir. (1990).

The most common means by which a defendant qualifies for a reduction in his offense level for acceptance of responsibility is by entering a guilty plea and admitting to the elements of the crime to which he is pleading. "This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." USSG § 3E1.1(a), comment. (n.2) (emphasis added).

In rare circumstances, a defendant may clearly accept responsibility, yet proceed to trial. Such a circumstance occurs when a defendant goes to trial to assert and preserve issues of constitutionality or statutory application unrelated to factual guilt. *United States v. Mack*, 159 F.3d 208, 220 (6th Cir. 1998); *United States v. Wilson*, 159 F.3d 280, 292 (7th Cir. 1998); *United States v. McKittrick*, 142 F.3d 1170, 1178 (9th Cir. 1998). In such cases, determination of whether the defendant accepted responsibility will be based primarily on pre-trial statements and conduct. *Mack*, 159 F.3d at 220.

Even if a defendant pleads guilty, the district court may properly find that the defendant has not accepted responsibility for his conduct and is, therefore, not entitled to a reduction in offense level. USSG §3E1.1, comment. (n.3) (A defendant who pleads guilty is not entitled to an adjustment pursuant to §3E1.1 as a matter of right.); *United States v. Muhammad*, 146 F.3d 161, 168 (3d Cir. 1998). An attempt to plead guilty also does not guarantee this reduction. *United States v. Ervasti*, 201 F.3d 1029, 1043 (8th Cir. 2000). In order to qualify for the reduction, the defendant must affirmatively accept personal responsibility. *United States v. Lublin*, 981 F.2d 367, 370 (8th Cir. 1992). The defendant must show sincere contrition to warrant such a reduction. *United States v. Beard*, 913 F.2d 193, 199 (5th Cir. 1990); *United States v. Royer*, 895 F.2d 28, 30 (1st Cir. 1990). The burden is on the defendant to demonstrate his acceptance of personal responsibility, *Lublin*, 981 F.2d at 370, by a preponderance of the evidence. *United States v. Middleton*, 246 F.3d 825, 845 (6th Cir. 2001)(citing *United States v. Tucker*, 925 F.2d 990, 991 (6th Cir. 1991)). "[T]he question is not whether [the defendant] has actively asserted his innocence but whether he clearly demonstrate[d] acceptance of his guilt." *United States v. Portillo-Valenzuela*, 20 F.3d 393, 394 (10th Cir. 1994). Being merely regretful is not sufficient to warrant the reduction. *United States v. Gallant*, 136 F.3d 1246, 1248 (9th Cir. 1998). The Third Circuit affirmed the denial of acceptance of responsibility to a defendant who pled guilty in order to obtain tactical advantage. *Muhammed*, 146 F.3d at 168. The range of conduct upon which a court may base its decision varies in different circuits.

The assertion of an entrapment defense has been found to be inconsistent with acceptance of responsibility when the defendant claims that his actions are not his fault, but rather are due to the inducements of the government. *United States v. Hansen*, 964 F.2d 1017, 1021-22 (10th Cir. 1992). Other courts have also reasoned that the reduction may not rest solely on the basis that a defendant admitted performing the acts leading to conviction when that defendant claims entrapment. *United States v. Chevre*, 146 F.3d 622, 623 (8th Cir. 1998); *United States v. Brace*, 145 F.3d 247, 264-65 (5th Cir. 1998) (entrapment defense is a challenge to criminal intent and thus to culpability); *United States v. Kirkland*, 104 F.3d 1403, 1405-06 (D.C. Cir. 1997); *United States v. Simpson*, 995 F.2d 109, 112 (7th Cir. 1993). *But see United*

*States v. Davis*, 36 F.3d 1424, 1435-36 (9th Cir. 1994) (district court may not deny defendant acceptance of responsibility solely because he has presented an entrapment defense). Similarly, the Tenth Circuit affirmed the denial of acceptance of responsibility to a defendant who acknowledged the factual basis for the charges and went to trial only to assert the insanity defense. *United States v. Moudy*, 132 F.3d 618, 621 (10th Cir. 1998). The district court may deny a reduction for acceptance of responsibility even when the actions of a defendant appear to be in accordance with the language contained in USSG §3E1.1 comment. (1). The Tenth Circuit found that the sentencing court properly denied a downward adjustment despite the defendants' payment of restitution. *United States v. Hollis*, 971 F.2d 1441, 1459 (10th Cir. 1992). In *Hollis*, the court found that the reduction was unavailable to the defendants who had signed a consent judgment only after conviction as to \$35,000 that had previously been seized. Likewise, the defendants' offer to pay \$90,000 in restitution in an effort to avoid indictment failed to qualify the defendants for a reduction. *Hollis*, 971 F.3d at 1459.

A defendant, in order to qualify for acceptance of responsibility, need not admit to conduct beyond the count of conviction. USSG §3E1.1, comment. (n.1(a)) ("a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a).") 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). 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. Therefore, a sentencing court cannot condition the acceptance of responsibility reduction on admitting conduct for which the defendant was not been convicted. See, e.g., *United States v. Frierson*, 945 F.2d 650, 659-60 (3d Cir. 1991); *United States v. Piper*, 918 F.2d 839, 841 (9th Cir. 1990); *United States v. Oliveras*, 905 F.2d 623, 632 (2d Cir. 1990); *United States v. Perez-Franco*, 873 F.2d 455, 463 (1st Cir. 1989). 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." USSG §3E1.1, comment. (n.1(a)); See *United States v. Bindley*, 157 F.3d 1235 (10th Cir. 1998). See also *United States v. Hicks*, 978 F.2d 722, 726 (D.C. Cir. 1992).

Courts have consistently rejected the argument that USSG § 3E1.1 unconstitutionally punishes a defendant who invokes his Fifth Amendment right not to incriminate himself by admitting his guilt. Denial of the two-level reduction does not constitute a penalty and does not implicate the Fifth Amendment. *United States v. Clemons*, 999 F.2d 154, 159 (6th Cir. 1993); *United States v. Saunders*, 973 F.2d 1354, 1362 (7th Cir. 1992); *United States v. Frazier*, 971 F.2d 1076, 1084 (4th Cir. 1992); *United States v. Piper*, 918 F.2d 839, 841 (9th Cir. 1990); *United States v. Henry*, 883 F.2d 1010, 1011 (11th Cir. 1989); *United States v. White*, 869 F.2d 822, 826 (5th Cir. 1989).

Once a court has determined that a defendant has accepted responsibility for his conduct, a court has no discretion to award less than the two-level reduction for acceptance of responsibility under §3E1.1(a). *United States v. Carroll*, 6 F.3d 735, 741 (11th Cir. 1993) (Section 3E1.1(a) does not contemplate a partial acceptance of responsibility or a court's being halfway convinced that a defendant accepted responsibility).

Appellate courts review a sentencing court's factual determination of whether an individual accepted responsibility deferentially, applying the clearly erroneous standard. *United States v. Mack*, 159 F.3d 208, 220 (6th Cir. 1998); *United States v. Fellows*, 157 F.3d 1198, 1202 (9th Cir. 1998); *United States v. Bove*, 155 F.3d 44, 46 (2d Cir. 1998); *United States v. Bonanno*, 146 F.3d 502, 512 (7th Cir. 1998); *United States v. Mamolejo*, 139 F.3d 528 (5th Cir.1998); *United States v. Cruz Camacho*, 137 F.3d 1220, 1226 (10th Cir.

1998); *United States v. McQuay*, 7 F.3d 800, 801 (8th Cir. 1993).

The sentencing court's factual finding is clearly erroneous only if egregiously, obviously, and substantially erroneous. *United States v. Ivy*, 83 F.3d 1266, 1294-95 (10th Cir. 1996).

Note that application note 4 to USSG § 3E1.1 states that "Conduct resulting in an enhancement under § 3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply." USSG § 3E1.1 comment. (n.4).

#### 5.08[2] Timely Government Assistance

In certain circumstances, a defendant may be entitled to a 3-level downward departure for acceptance of responsibility. Effective November 1, 1992, Guideline Section 3E1.1 was amended to provide for a 3-level downward departure:

If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:

(1) timely providing complete information to the government concerning his own involvement in the offense; or

(2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently, decrease the offense by 1 level.

USSG §3E1.1(b).

Thus, USSG §3E1.1(b) provides an additional one-level decrease in offense level for a defendant: (1) whose offense level is 16 or greater before any reduction under §3E1.1(a); and (2) who admits responsibility under §3E1.1(a); and (3) who assists the government by timely either: (a) providing complete information about his own involvement in the case, or (b) notifying authorities of intent to plead guilty, "thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently." *United States v. Easterling*, 157 F.3d 1220, 1224 (10th Cir. 1998). The defendant must prove that he is entitled to this additional reduction by a preponderance of the evidence. *United States v. Wilson*, 134 F.3d 855, 871 (7th Cir. 1998); *United States v. Morillo*, 8 F.3d 864, 871 (1st Cir. 1993).

In order to qualify for the additional one-level reduction, a defendant must satisfy all three prongs of the test -- i.e., (1) the defendant must have an offense level higher than 16 before any reduction for accepting responsibility; (2) the defendant must accept responsibility; and (3) the defendant must have timely assisted the Government. *United States v. Garcia*, 135 F.3d 951, 956-57 (5th Cir. 1998). See *United States v. Leonard*, 61 F.3d 1181, 1187 (5th Cir. 1995), in which the court denied an additional one-level reduction when the defendant waived his right to a jury trial and stipulated to most of the evidence but did not plead guilty and save government resources which were required for trial.

Note, however, Section 3E1.1(b) is written in the disjunctive and, therefore, a defendant need not satisfy both timeliness requirements of (b)(1) and (b)(2) to qualify for the third-point reduction. *United States v. Elyer*, 67 F.3d 1386, 1391 (9th Cir. 1995); *United States v. Lancaster*, 112 F.3d 156, 158 (4th Cir. 1997).

Timeliness is the key to determining whether a defendant merits this additional one-level reduction. *Lancaster*, 112 F.3d at 158;

*United States v. Thompson*, 60 F.3d 514, 517 (8th Cir. 1995). The focus of an inquiry into the timeliness of a defendant's conduct is "whether the defendant provides information in sufficient time to aid the Government in the investigation or prosecution of the case." *Thompson*, 60 F.3d at 517; See *Lancaster*, 112 F.3d at 158. As the guidelines note, the conduct qualifying for a decrease in offense level under Sections 3E1.1(b)(1) and (2) generally will occur "particularly early in the case." USSG §3E1.1, comment. (n.6). This is so even if the information the defendant discloses is otherwise easily discoverable. *Lancaster*, 112 F.3d at 158; *United States v. Stoops*, 25 F.3d 820, 822-23 (9th Cir. 1994).

Timeliness of a defendant's acceptance of responsibility is a context-specific, factual question, to be determined on a case-by-case basis. USSG §3E1.1(b), comment. (n.6); *United States v. Ayers*, 138 F.3d 360, 364 (8th Cir. 1998); *United States v. Marroquin*, 136 F.3d 220, 224 (1st Cir. 1998); *Lancaster*, 112 F.3d at 158; *United States v. McPhee*, 108 F.3d 287, 289 (11th Cir. 1997); *United States v. Hawkins*, 78 F.3d 348, 352 (8th Cir. 1996); *United States v. Eyler*, 67 F.3d 1386, 1391 (9th Cir. 1995); *United States v. McConaghy*, 23 F.3d 351, 353 (11th Cir. 1993). Because it is fact-specific, timeliness "cannot always be measured by counting calendar pages." *United States v. Dethlefs*, 123 F.3d 39, 43 (1st Cir. 1997). Pleas on the eve of trial are generally untimely. *United States v. Brown*, 148 F.3d 1003, 1007 (8th Cir. 1998); *United States v. Wilson*, 134 F.3d 855, 871-72 (7th Cir. 1998); *United States v. Kimple*, 27 F.3d 1409, 1413 (9th Cir. 1994); *United States v. Tello*, 9 F.3d 1119, 1125 (5th Cir. 1993); *United States v. Donovan*, 996 F.2d 1343, 1345 (1st Cir. 1993).. "Thus, a defendant who delays the disclosure of information to the Government until shortly before a scheduled trial does not qualify for the reduction." *Lancaster*, 112 F.3d at 158-59. See also *Thompson*, 60 F.3d at 517; *United States v. Hopper*, 27 F.3d 378, 384-85 (9th Cir. 1994). Likewise, "[p]leas [on the eve of trial] do not help either the Government to avoid trial preparation or the court to manage its schedule efficiently, the two purposes served by the . . . additional one-point reduction." *United States v. Gilbert*, 138 F.3d 1371, 1373 (3d Cir. 1998). However, a court may consider prosecutorial foot dragging when ascertaining a plea's timeliness. *Wilson*, 134 F.3d at 872.

Once a court has determined that a defendant has accepted responsibility for his criminal acts and meets the three-prong test of §3E1.1, a sentencing court cannot withhold the third-level reduction for issues other than timeliness. *United States v. McPhee*, 108 F.3d 287, 289 (11th Cir. 1997) ("whether or not to grant the additional one-level reduction is a matter of determining only whether the defendant timely provided information and notified authorities of his intention to enter a plea of guilty."); *United States v. Townsend*, 73 F.3d 747, 755 (7th Cir. 1996); *United States v. Huckins*, 53 F.3d 276, 279 (9th Cir. 1995). The First, Seventh, and Ninth Circuit hold that the additional one-point reduction is "mandatory," not permissive once the defendant satisfies the relevant guideline criteria. *United States v. Marroquin*, 136 F.3d 220, 223 (1st Cir. 1998); *United States v. Villasenor-Cesar*, 114 F.3d 970, 973 (9th Cir. 1997); *United States v. Cunningham*, 103 F.3d 596, 598 (7th Cir. 1996); *United States v. Garrett*, 90 F.3d 210, 213 (7th Cir. 1996); *Townsend*, 73 F.3d at 755; *Eyler*, 67 F.3d at 1390; *United States v. Talladino*, 38 F.3d 1255, 1262-63 (1st Cir. 1994).

Courts which have addressed the issue whether the additional one-level reduction may be withheld on timeliness grounds when a defendant's motions caused delay generally have found it proper to deny the reduction unless the defendant filed a motion to protect a constitutional right. See, e.g., *United States v. Kimple*, 27 F.3d 1409, 1413 (9th Cir. 1994), in which the Ninth Circuit held that "[t]he denial of a reduction under subsection (b)(2) is impermissible if it penalizes a defendant who has exercised his constitutional rights." However, in *Kimple*, the court noted that despite the protection of a defendant's constitutional right, the one-level reduction could have been denied had the defendant failed to notify authorities of his intent to

plead guilty in time for the government to avoid trial preparation or before the case had been set for trial. *Kimple*, 27 F.3d at 1414. Other courts have held that limiting offense-level reductions if the defendant does not act in a timely manner does not penalize the defendant for exercising rights. *Gilbert*, 138 F.3d at 1373; *United States v. Smith*, 127 F.3d 987, 989 (11th Cir. 1997).

## 5.09 DEPARTURES

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

A guidelines sentence is mandatory, and departure from the prescribed guidelines range is justified only in limited circumstances. Departures are governed by Guideline Section 5K. Section 5K1.1, which is discussed in the next section, provides for a downward departure upon the motion of the government when the defendant has provided substantial assistance to the government. Section 5K provides a non-exhaustive outline of factors which the court may consider in enhancing or reducing a defendant's sentence. These factors include, but are not limited to:

- the victim's death;
- the victim's physical injury;
- the victim's extreme psychological injury;
- abduction or unlawful restraint of the victim;
- property damage or loss not otherwise accounted for within the USSG;
- weapons and dangerous instrumentalities;
- disruption of Government function unless inherent in the offense; [\[FN14\]](#)
- extreme conduct to victim;
- victim's contributory conduct;
- lesser harm avoided;
- coercion and duress;
- involuntarily diminished capacity; [\[FN15\]](#)
- public welfare;
- voluntary disclosure prior to discovery, where discovery is otherwise unlikely; [\[FN16\]](#)
- possession of high-capacity, semiautomatic firearms during offense; and
- violent gang membership.

When contemplating departure, the sentencing court must first determine the appropriate guidelines sentence. Then the court considers whether there are aggravating or mitigating circumstances present which warrant departure. [\[FN17\]](#) *United States v. Davern*, 970 F.2d 1490, 1493 (6th Cir. 1992). The defendant must prove by a preponderance of the evidence that he is entitled to downward departure. *United States v. Wilson*, 134 F.3d 855, 871 (7th Cir.), cert. denied, 525 U.S. 894 (1998); *United States v. Urrego-Linares*, 879 F.2d 1234, 1238 (4th Cir. 1989). The government bears the burden of proof by a preponderance of the evidence when seeking an upward departure. *United States v. Walls*, 80 F.3d 238, 241 (7th Cir. 1996); *United States v. Okane*, 52 F.3d 828, 835 (9th Cir. 1995). A district court's decision not to depart downward is not appealable when the guideline range was properly computed unless the district court was



unaware of its power to depart and the sentence was imposed in violation of law or the guidelines were applied incorrectly. *United States v. Logan*, 250 F.3d 350, 374 (6th Cir. 2001). See also *United States v. Mounkes*, 204 F.3d 1024, 1030-31 (10th Cir.), cert. denied, 530 U.S. 1230 (2000); *United States v. Lalley*, 2001 WL 789093, \*4 (8th Cir. July 13, 2001).

In addition to those reasons for departure delineated by the USSG §5K, the court may depart when the court finds that there exists an "aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); *Burns v. United States*, 501 U.S. 129, 133 (1991). Thus, the only circumstance justifying departure from the "mechanical dictates" of the guidelines occurs when the court finds that the case falls outside the "heartland" cases covered by the guidelines. *Id.*; See, generally, USSG §5K2.0 comment. (1998). The Seventh Circuit characterizes the "outside the heartland cases" in the following manner:

The Sentencing Guidelines were intended to carve out a "heartland," or a set of typical cases, against which each successive case would be measured. Departures from the guidelines are allowed only in cases that involve factors for which the guidelines do not adequately account, either because the factors are nowhere incorporated into the guidelines or because the factors are present in an exceptional way. Therefore, a factor supporting departure from the guidelines must be sufficiently unusual either in type or degree to take the case out of the Guidelines' heartland.

*United States v. Carter*, 122 F.3d 469, 473 (7th Cir. 1997)(citations and punctuation omitted), quoting *United States v. Otis*, 107 F.3d 487, 490 (7th Cir. 1997) and *Koon v. United States*, 518 U.S. 81 (1996).

Essentially, for purposes of departure, a court may take into consideration any factor which the Guidelines do not proscribe:

. . . [A] federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor. If the answer to the question is no -- as it will be most of the time -- the sentencing court must determine whether the factor, as occurring in the particular circumstances, takes the case outside the heartland of the applicable Guideline.

*Koon v. United States*, 518 U.S. at 109. See *United States v. Whitaker*, 152 F.3d 1238, 1239-40 (10th Cir. 1998); *United States v. Rhodes*, 145 F.3d 1375 (D.C. Cir. 1998); *United States v. O'Hagan*, 139 F.3d 641, 657 (8th Cir. 1998); *United States v. Arce*, 118 F.3d 335, 339 (5th Cir. 1997); *United States v. Brown*, 98 F.3d 690, 693 (2d Cir. 1996).

In *Koon*, the Supreme Court agreed with then-Chief Judge Breyer's explanation in *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993) that a sentencing court considering a departure should ask itself the following questions:

- 1) What features of this case, potentially, take it outside the Guidelines' "heartland" and make of it a special, or unusual, case?
- 2) Has the Commission forbidden departures based on those features?
- 3) If not, has the Commission encouraged departures based on those features?
- 4) If not, has the Commission discouraged departures based on those features?

*Koon*, 518 U.S. at 95. The Court further explained:

If the special factor is a forbidden factor, the sentencing court cannot use it as a basis for departure. If the special factor is an encouraged factor, the court is authorized to depart if the applicable Guideline does not already take it into account. If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some way makes the case different from the ordinary case where the factor is present. If a factor is unmentioned in the Guidelines, the court must, after considering the "structure and theory of both relevant individual guidelines and the Guidelines taken as a whole" decide whether it is sufficient to take the case out of the Guideline's heartland. The court must bear in mind the Commission's expectation that departures based on grounds not mentioned in the Guidelines will be "highly infrequent." 1995 U.S.S.G. ch.1, pt. A, p.6.

*Koon*, 518 U.S. at 95-96.

The Commission lists certain factors which can never be bases for departure: 1) race, sex, national origin, creed, religion, socioeconomic status, USSG § 5H1.1; 2) lack of guidance as a youth, USSG § 5H1.4; and economic hardship, USSG § 5K2.12. With the exception of those factors which are explicitly forbidden, the Commission did not "intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case." USSG ch. 1, pt A, intro. comment. 4(b). Further, it has been held that USSG § 5K2.0 does not authorize a sentencing court to grant a substantial assistance departure without a motion from the Government since the Guidelines adequately consider substantial assistance departures in USSG § 5K1.1. *United States v. Maldonado-Acosta*, 210 F.3d 1182, 1184 (10th Cir. 2000).

Courts have departed from the guidelines in a myriad of circumstances after finding the circumstances surrounding the case placed it "outside the heartland". A few examples in which a court found the case to be outside the heartland are: (1) upward departure where defendant egregiously obstructed justice by conspiring to hide millions in assets from the IRS (*United States v. Furkin*, 119 F.3d 1276, 1284 (7th Cir. 1997)); (2) downward departure where government agent in conspiracy and money laundering sting manipulated defendant through sexual misconduct (*United States v. Nolan-Cooper*, 155 F.3d 221, 244 (3d Cir. 1998)); (3) downward departure for extraordinary rehabilitation effort (*Whitaker*, 152 F.3d at 1239-40); (4) upward departure where defendant misrepresented himself as acting on behalf of charitable organization (*United States v. Smith*, 133 F.3d 737, 750 (10th Cir. 1997)); (5) downward departure for extraordinary pre-conviction record of civic contributions (*United States v. Crouse*, 145 F.3d 786, 791 (6th Cir. 1998)); (6) upward departure for use of minor to perpetrate mail fraud (*United States v. Porter*, 145 F.3d 897 (7th Cir. 1998)); (7) downward departure for homosexual defendant vulnerable to abuse in prison (*United States v. Wilke*, 156 F.3d 749, 753-54 (7th Cir. 1998)); (8) upward departure where three of four bank robbers were armed and one used an Uzi (*United States v. Omar*, 24 F.3d 1356 (11th Cir. 1994)); (9) upward departure for defendant who had a persistent 10-year history of violent antisocial behavior (*United States v. Hardy*, 99 F.3d 1242, 1245 (1st Cir. 1996)); and (10) downward departure for multiplicity of factors, not one of which, if individually considered, would take a situation out of the "heartland," combined to do so (*United States v. Rioux*, 97 F.3d 648, 663 (2d Cir. 1996)).

The defendant's intent to pay eventually may justify downward departure in tax evasion cases. *United States v. Brennick*, 134 F.3d 10, 13-15 (1st Cir. 1998). Job loss by innocent employees may justify downward departure in criminal tax evasion cases. *United States v. Olbres*, 99 F.3d 28, 34 (1st Cir. 1996) (under *Koon v. United States*, 518 U.S. 81, 109-10 (1996), a factor the Guidelines neither forbid nor discourage may be considered).

Appellate courts have declined to find cases "outside the heartland" where:

- (1) a defendant made restitution within Guidelines' contemplation (*United States v. O'Kane*, 155 F.3d 969, 975 (8th Cir. 1998));
- (2) a defendant was willing to be deported (*United States v. Marin-Castenada*, 134 F.3d 551, 555 (3d Cir. 1998); *United States v. Clase-Espinal*, 115 F.3d 1054, 1059 (1st Cir. 1997));
- (3) district courts reconciled state and federal sentencing disparities and differences between codefendants (*United States v. Jones*, 145 F.3d 959, 962 (8th Cir. 1998); *United States v. Schulte*, 144 F.3d 1107, 1109 (7th Cir. 1998); *United States v. Willis*, 139 F.3d 811, 812 (11th Cir. 1998); *United States v. Snyder*, 136 F.3d 65, 67 (1st Cir. 1998); *United States v. Searcy*, 132 F.3d 1421, 1422 (11th Cir. 1998));
- (4) a defendant asserted "cultural differences" (*United States v. Tomono*, 143 F.3d 1401, 1404 (11th Cir. 1998); *United States v. Weise*, 128 F.3d 672 (8th Cir. 1997));
- [FN18] (5) a defendant was traumatized by ingesting smuggled heroin (*United States v. Marin-Castaneda*, 134 F.3d 551, 557 (3d Cir. 1998));
- (6) the sentencing court considered the costs of imprisoning the defendant (*United States v. Wong*, 127 F.3d 725, 728 (8th Cir. 1997));
- (7) a relatively minor white-collar offender who used credit cards without authorization was harshly punished under the Guidelines (*United States v. Weaver*, 126 F.3d 789, 793 (6th Cir. 1997));
- and (8) a defendant committed a fraud of long duration and great extent against eight financial institutions, depriving them of \$500,000 (*United States v. Alpert*, 28 F.3d 1104, 1108-09 (11th Cir. 1994)).

Courts consistently hold that only "extraordinary" family responsibilities warrant downward departure. *United States v. Jones*, 158 F.3d 492, 499 (10th Cir. 1998); *United States v. Archuleta*, 128 F.3d 1446, 1550 (10th Cir. 1997); *United States v. Carter*, 122 F.3d 469, 474 (7th Cir. 1997); *United States v. Romero*, 32 F.3d 641 (1st Cir. 1994); *United States v. Johnson*, 964 F.2d 124, 128 (2d Cir. 1992); *United States v. Thomas*, 930 F.2d 526, 530 (7th Cir. 1991). "Disruption of the defendant's life, and the concomitant difficulties for those who depend on the defendant, are inherent in the punishment of incarceration." *United States v. Tejada*, 146 F.3d 84, 87 (2d Cir. 1998) (citations omitted).

To similar effect, defendants' mental and physical health problems rarely rise to the level of "extraordinary physical impairment" necessary for downward departure. USSG §§5H1.3, 5H1.4. Sentencing courts have, however, found extraordinary impairments in the following cases: (1) liver cancer where death is imminent (*United States v. Maltese*, 1993 WL 222350, at \*10 (N.D.Ill. 1993)); and (2) cancer spread, combined with removal of testicles and ongoing chemotherapy (*United States v. Velasquez*, 762 F.Supp. 39, 40 (E.D.N.Y. 1991)). Appellate courts regularly affirm denial of downward departures to defendants with AIDS (*United States v. Rabins*, 63 F.3d 721, 727-29 (8th Cir. 1995)) and past brain tumor operations (*United States v. Carey*, 895 F.2d 318, 324 (7th Cir. 1990)). Where a defendant's condition merely requires monitoring, a sentencing court's refusal to depart downwardly will be affirmed. *United States v. Altman*, 48 F.3d 96, 104 (2d Cir. 1995).

When a sentencing court finds that departure from the prescribed guideline range is merited, 18 U.S.C. § 3553(c)(1) requires that the court state on the record its specific reasons for its imposition of the particular sentence.

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. Porter*, 23 F.3d 1274, 1280 (7th Cir. 1994). 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). A sentencing court must justify the "particular" sentence imposed. *United States v. Zanghi*, 209 F.3d 1201, 1205 (10th Cir. 2000) (appellate court remanded sentencing determination to district court for explanation as to supervised release and home confinement when district court only justified prison term). Additionally, Rule 32, Fed. 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*, 501 U.S. at 138-39.

Within the parameters of 18 U.S.C. § 3553, departure is within the sentencing court's sound discretion. *Koon*, 518 U.S. at 109; *United States v. Kaye*, 140 F.3d 86 (3d Cir. 1998); *United States v. Morris*, 139 F.3d 582 (8th Cir. 1998). Likewise, a sentencing court may properly refuse to exercise its discretion to depart from the Guidelines. *United States v. Brye*, 146 F.3d 1207, 1213 (10th Cir. 1998); *United States v. Strickland*, 144 F.3d 412, 417 (6th Cir. 1998); *United States v. Rizzo*, 121 F.3d 794, 798-99 (1st Cir. 1997); *United States v. Hernandez-Reyez*, 114 F.3d 800, 801 (8th Cir. 1997); *United States v. Washington*, 106 F.3d 983, 1016 (D.C. Cir. 1997); *United States v. Moore*, 54 F.3d 92, 102 (2d Cir. 1995); *United States v. Byrd*, 53 F.3d 144, 145 (6th Cir. 1995).

In summary, in order to sustain a decision to depart upward or downward from the applicable sentencing guideline range, the sentencing court must: (1) interpret USSG policy statements correctly; (2) perform mathematical calculations accurately; and (3) articulate the reason for its decision on the record. *United States v. Kingdom (U.S.A.), Inc. et al*, 157 F.3d 133, 135 (2d Cir. 1998); *United States v. Isaza-Zapata*, 148 F.3d 236, 238 (3d Cir. 1998); *United States v. Szabo*, 147 F.3d 559, 561 (7th Cir. 1998). It must articulate the specific aggravating or mitigating circumstance and how it differs from "heartland" conduct in the commission of the crime. *United States v. Onofre-Segarra*, 126 F.3d 1308, 1310 (11th Cir. 1997); *United States v. Miller*, 78 F.3d 507, 511 (11th Cir. 1996). An appellate court will use an abuse of discretion standard when reviewing a trial court's evaluation of whether the facts and circumstances place it outside the "heartland." *Santoyo*, 146 F.3d at 525. Finally, a court must furnish reasonable notice to the parties of its intent to depart and to identify with specificity the grounds for departure. *Burns*, 501 U.S. at 138-39.

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

Title 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n) grant a court, upon Government motion, limited authority to impose a sentence beneath the statutory minimum when that defendant has provided substantial assistance to the government. The Sentencing Guidelines permit the government to request a downward departure from the guidelines pursuant to Section 5K1.1 when the defendant has rendered substantial assistance. USSG §5K1.1. [\[FN19\]](#)

Title 18 U.S.C. § 3553(e) provides:

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation and prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

18 U.S.C. § 3553(e).

Title 28 U.S.C. § 994(n) provides:

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

28 U.S.C. § 944(n).

Finally, Section 5K1.1 of the guidelines provides:

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

USSG §5K1.1 p.s. The commentary notes that:

[u]nder circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence

USSG §5K1.1 comment. (n.1).

Analyzing the interplay between Code Sections 3553(e) and 944(n) and Guideline Section 5K1.1, the Supreme Court addressed the issue of whether Section 5K1.1(a) authorizes a sentencing court to depart below the statutory minimum when the government filed a motion for departure from the guideline range based upon substantial assistance. *Melendez v. United States*, 518 U.S. 120 (1996). The Supreme Court held that in order for the court to sentence a defendant to a range below the statutory minimum, the government must have so moved the court pursuant to 18 U.S.C. § 3553(e). A motion pursuant to Section 5K1.1 has the effect of "withhold[ing] from the district court the power to depart below the statutory minimum." See, generally, *Melendez*, 518 U.S. at 129-131; *In re Sealed Case (Sentencing Guidelines' "Substantial Assistance")*, 149 F.3d 1198, 1201 (D.C. Cir. 1998) (government motion under section 5K1.1 for departure below sentencing guideline range does not also permit departure below the statutory minimum under 18 U.S.C. § 3553(e)) (citation omitted); *United States v. Coleman*, 132 F.3d 440, 442 (8th Cir. 1998). The District of Columbia Circuit, however, determined that a sentencing court may depart downward for substantial assistance in the absence of a motion by the government where the circumstances of the case place it beyond the guidelines' "heartland." *In re Sealed Case ("Sentencing Guidelines")*, 149 F.3d at 1202.

Thus, within the parameters of USSG §5K1.1, upon motion by the Government, the sentencing court may make a downward departure from the guidelines range because the defendant substantially assisted the Government. The Government motion must state the defendant provided substantial assistance in the investigation or prosecution of another person who committed an offense. Section 5K1.1(a) sets forth a non-exhaustive list of considerations for the court in determining the degree of departure:

The appropriate reduction shall be determined by the court for reasons stated, [FN20] that may include, but are not limited to, consideration of the following:

- (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; [FN21]
- (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).

In the event that the government elects not to file a motion for downward departure and there is a plea agreement which contains language regarding the availability of a Section 5K1.1 motion, the sentencing court applies settled principles of contract law to a defendant's challenge. *United States v. Isaac*, 141 F.3d 477, 482-83 (3d Cir. 1998). In plea agreements, the government regularly refers to the possibility of a Section 5K1.1 motion, but reserves discretion to determine whether such a motion is appropriate. *United States v. Benjamin*, 138 F.3d 1069, 1063 (6th Cir. 1998); *United States v. Watson*, 988 F.2d 544, 552 n.3 (5th Cir. 1993). The government is the appropriate party to assess whether the defendant has performed the conditions of his plea agreement, even if the plea agreement is silent as to the appropriate party. *United States v. Snow*, 234 F.3d 187, 190 (4th Cir. 2000). In the event that the government elects not to file the motion, the sentencing court may review the government's refusal to make a motion for downward departure "if that refusal was based on an unconstitutional motive such as bias against the defendant's race or religion." *Wade v. United States*, 504 U.S. 181, 185-86 (1992); *United States v. Santoyo*, 146 F.3d 519, 523 (7th Cir. 1998); *United States v. Carter*, 122 F.3d 469, 476 (7th Cir. 1997). The defendant bears the burden of making a substantial threshold showing of an unconstitutional motive before he is entitled to discovery or an evidentiary hearing on the issue. *Wade*, 504 U.S. at 186; *United States v. Kelly*, 14 F.3d 1169, 1177 (7th Cir. 1994). Accord *United States v. Isaac* 141 F.3d at 484; *United States v. Leonard*, 50 F.3d 1152, 1157-58 (2d Cir. 1995). The court may also review whether the government's refusal was in bad faith, and, accordingly, in violation of the plea agreement. *Isaac*, 141 F.3d at 483-84; *United States v. Rexach*, 896 F.2d 710, 713 (2d Cir. 1990). "The sole requirement is that the government's position be based on an honest evaluation of the assistance provided and not on considerations extraneous to that assistance." *Isaac* at 484. There is a split of opinion as to whether the government forfeits its discretion by failing to reserve it in a plea agreement. See *Snow*, 234 F.3d at 190; but see *United States v. Courtois*, 131 F.3d 937, 938-39 (10th Cir. 1997) (contractual silence waives the government's discretion); *United States v. Price*, 95 F.3d 364, 368 (5th Cir. 1996) (same).

If the plea agreement contains an unambiguous and unconditional promise to file a downward departure motion and the promise was consideration for the guilty plea, the defendant is entitled to either specific performance or withdrawal of the guilty plea unless the government proves that the defendant breached the plea agreement. See, e.g., *Benjamin*, 138 F.3d at 1073-74; *United States v. Mitchell*, 136 F.3d 1192, 1194 (8th Cir. 1998). Where the Government alleges the defendant breached the plea agreement, it must prove the breach by a preponderance of the evidence before the Government can be relieved of its obligations under the plea agreement. *Benjamin*, 138 F.3d at 1073; *United States v. Crowell*, 997 F.2d 146, 148 (6th Cir. 1993); *United States v. Tilley*, 964 F.2d 66, 71 (1st Cir. 1992).

Appellate review of a district court decision whether to depart downward pursuant to a Section 5K1.1 motion is available only in limited situations. Review of a sentence is governed by 18 U.S.C. § 2742 and provides for four situations: the sentence (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; (3) was not within the applicable guideline range; and (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable. 18 U.S.C. § 2742. An appellate court "may not review the merits of a court's decision not to downwardly depart, or probe the sufficiency of its consideration, so long as the sentence imposed is not a violation of law or a misapplication of the Guidelines." *United States v. Campo*, 140 F.3d 415, 418 (2d Cir. 1998).

A sentencing court's refusal to consider a § 5K1.1 motion is appealable. *Campo*, 140 F.3d at 418. In *Campo*, the district court refused to make a downward departure despite the filing of a Section 5K1.1 motion because the government did not recommend a specific below-guidelines range. The court noted that, although the district court had discretion whether to grant the motion, the district court's refusal to exercise that discretion resulted in a sentence imposed "in violation of law." *Campo*, 140 F.3d at 418. Likewise, it is legal error, and thus appealable, when a court fails to recognize its authority to depart from the guidelines; *In re Sealed Case ("Sentencing Guidelines")*, 149 F.3d at 1199 (Although district court decisions not to depart are generally not subject to appellate review, appellate court has jurisdiction because appellant argues district court misconstrued legal authority under the Guidelines); *United States v. Adeniyi*, 912 F.2d 615, 619 (2d Cir. 1990). *Accord United States v. Poff*, 926 F.2d 588, 590-91 (7th Cir. 1991)(en banc) (court's failure to appreciate its authority to depart is reviewable, while court's decision not to depart is unreviewable).

Although a district court's decision not to depart is generally unreviewable, an appellate court will review a trial court's discretionary refusal to grant a downward departure when the defendant argues that the district court misconstrued the legal standards governing its authority to depart. *Carter*, 122 F.3d at 471, n.1. In such a case, the court reviews for abuse of discretion. *Id.* at 472. A district court abuses its discretion when it makes an error of law. *Koon v. United States*, 518 U.S. 81, 100 (1996). When the issue is whether a given factor could ever be a permissible basis for departure, the question is one of law subject to de novo review. *In re Sealed Case ("Sentencing Guidelines")*, 149 F.3d at 1198.

---

#### 5.10 WAIVER OF APPEAL OF SENTENCE IN PLEA AGREEMENTS

In certain situations, a defendant may be entitled to appeal the sentence imposed on him by the court. Title 18, United States Code, Section 3742 (a) enumerates the grounds on which a defendant may file a notice of appeal in the district court for review of an otherwise final sentence. That section provides:

(a) Appeal by a defendant.--A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

18 U.S.C. § 3742. A criminal defendant can waive the statutory right to appeal a sentence pursuant to Section 3742. *United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995); *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992), *United States v. Navarro-Botello*, 912 F.2d 318, 320 (9th Cir. 1990).

Generally, a plea agreement will contain language which constitutes a

defendant's waiver of appeal rights, particularly the right to appeal the sentence which the court imposes. A waiver-of appeal-rights provision in a valid plea agreement is enforceable "as long as the waiver is the result of a knowing and intelligent right to forgo the right to appeal." *United States v. Attar*, 38 F.3d 727, 731 (4th Cir. 1994). *Accord United States v. Teeter*, 2001 WL 812097, \*8 (1st Cir. July 23, 2001) (plea-agreement waivers of the right to appeal from imposed sentences are presumptively valid (if knowing and voluntary)); *United States v. Williams*, 184 F.3d 666, 668 (7th Cir. 1999) ("if the agreement is voluntary, and taken in compliance with Rule 11, then the waiver of appeal must be honored"); *United States v. Hernandez*, 134 F.3d 1435, 1437 (10th Cir. 1998); *United States v. Zink*, 107 F.3d 716, 717 (9th Cir. 1997) ("An express waiver of the right to appeal in a negotiated plea of guilty is valid if knowingly and voluntarily made."); *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir.1992). (Note that an illegal sentence can still be challenged under 28 U.S.C. § 2255 for habeas corpus relief. *United States v. Rutan*, 956 F.2d at 829).

Plea agreements "are governed by ordinary contract principles." *United States v. Barnes*, 83 F.3d 934, 938 (7th Cir. 1996). As such "waivers of appeal must stand or fall with the agreements of which they are a part." *United States v. Wenger*, 58 F.3d 280, 289 (7th Cir. 1995).

The language of the waiver will determine the scope of the rights waived by the defendant, and an ambiguity will be strictly construed against the government. *United States v. Ready*, 82 F.2d 551, 560 (2d Cir. 1996).

For example, the Second Circuit found that the language in a plea agreement regarding the defendant's waiver of his right to appeal his sentence was ambiguous regarding whether he also waived his right to appeal a restitution order. *Ready*, 82 F.2d at 560. The *Ready* court strictly construed the waiver language to prohibit only an appeal of the Sentencing Guideline sentence. Consequently, the court considered the merits of the defendant's claim regarding the restitution order. Likewise, the Ninth Circuit found that language in a plea agreement waiving the defendant's right to appeal his sentence did not preclude the defendant from appealing a restitution order. *United States v. Catherine*, 55 F.3d 1462 (9th Cir. 1995).

Even in cases in which there is a valid waiver of appellate rights, the defendant can appeal his sentence in the event that the district court considers an impermissible factor, such as race, or the sentence exceeds the statutory maximum. *United States v. Kratz*, 179 F.3d 1039, 1041 (7th Cir. 1999). Also, "a defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court. *Kratz*, 179 F.3d at 1043; *Marin*, 961 F.2d at 496. See also *Yemitan*, 70 F.3d at 748.

In cases where there has been no waiver, a district court's decision not to depart from the applicable guideline range is generally unappealable. *United States v. Lainez-Leiva*, 129 F.3d 89, 93 (2d Cir. 1997).

The only exceptions occur where "a violation of law occurred, the Guidelines were misapplied, or the refusal to depart was based on the sentencing court's mistaken conclusion that it lacked the authority to do so." *United States v. Garcia*, 166 F.3d 519, 521 (2d Cir. 1999).

Note that the 1999 Amendments to the Federal Rules of Criminal Procedure (effective December 1, 1999), changed Fed. R. Crim. P. 11(c) to require the trial court to determine if the defendant understands any provision in the plea agreement waiving the right to appeal or to collaterally attack the sentence.

Also note that the issue of when the government may appeal a sentence is addressed in Section 5.15[3] of this manual.

---

### 5.11 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. These statements of policy are incorporated into the U.S. Attorneys Manual.

## 5.12 PLEA AGREEMENTS

### 5.12[1] **Plea Agreements and Major Count Policy for Offenses Committed Before November 1, 1987**

Although most of the cases currently being prosecuted involve post-guideline offenses, there continue to be a few cases which, because of tolling provisions of the statute of limitations, involve pre-guideline offenses. 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). U.S.A.M. 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) take priority over other substantive tax 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.

U.S.A.M. 6-4.310.

### 5.12[2] **Plea Agreements and Major Count Policy for Offenses Committed After November 1, 1987**

The advent of the Sentencing Guidelines in 1987 and the Department's adoption of policies pursuant thereto necessitated certain minor conforming changes to the Tax Division's Major Count Policy (U.S.A.M. 6-4.310).

#### *A. Tax Offenses Which Are All Part of the Same Course of Conduct or Common Scheme or Plan*

Normally, no change in the application of the Major Count Policy will be required by virtue of the Guidelines and the Department's plea policy for Guideline cases. In most cases, all of the tax charges in an indictment are related. Consequently, even if the defendant pleads to a single count and the remaining counts are dismissed, the tax loss from all of the years should be taken into account in determining the tax loss for the offense to which a defendant pleads. Thus, in the usual case, the Tax Division will continue to designate a single count as the major count according to the principles previously utilized in designating the major count. See U.S.A.M. 6-4.310.

*B. Tax Offenses Which Are Not All Part of the Same Course of Conduct or Common Scheme or Plan*

Where all of the tax charges are not part of the same course of conduct or common scheme or plan, however, the Department's plea policy for Guideline cases may require the Tax Division either to designate as major counts one count from each group of unrelated counts or to 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 Sec. 1B1.2(c)). This will be the case where the offense level of the group with the highest offense level must be increased under USSG §3D1.4.

*C. Designating More Than One Count as a Major Count.*

Designating more than a single year as a major count may also be required where the computed guideline sentencing range exceeds the maximum sentence which can be imposed under a single count.

*D. Tax Charges and Non-Tax Charges.*

In cases in which there are both tax counts and non-tax charges, the selection of which tax count to designate as the major count may not have any effect on the applicable guideline range because the offense level of the group or groups of non-tax offenses is 9 or more levels higher than the offense level of the group containing the tax charges (See USSG §§ 3D1.2, 3D1.4). In such cases, the Tax Division will normally continue to designate the major count by application of the usual rules for selecting the major count. However, the Tax Division may designate a less serious tax offense in the group as the major count if it is supplied with sufficient information establishing that such a selection will not affect the applicable guideline range and with adequate justification for a deviation from the Major Count Policy.

**5.12[3] Nolo Contendere Pleas.**

Department of Justice 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 the defendant 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, as a *nolo* plea does not entitle the government to use the doctrine of collateral estoppel. Federal prosecutors may not consent to a plea of *nolo contendere* except in the most unusual circumstances and only after a recommendation for doing so has been approved by the Assistant Attorney General, Tax Division. See U.S.A.M. 9-16.010 and 9-27.500. The government attorney also will oppose dismissal of any charges to which the defendant does not plead *nolo contendere*. See U.S.A.M. 9-27.530.

**5.12[4] Alford Pleas**

In *North Carolina v. Alford*, 400 U.S. 25 (1970), the Supreme Court upheld the validity of accepting a plea of guilty over the defendant's claims of innocence. United States Attorneys are instructed not to consent to a so-called "Alford plea" except in the most unusual circumstances and then only after a recommendation for so doing has been approved by the Assistant Attorney General, Tax Division, or a higher departmental official. See U.S.A.M. 9-16.015 and 9-27.440. Apart from refusing to enter into *Alford* plea agreements, however, the degree to which government attorneys can express their opposition to such pleas is limited. Prosecutors should discourage *Alford* pleas by refusing to agree to terminate prosecutions where such a plea is proffered to fewer than all of the charges pending. If an *Alford* plea to fewer than all charges is tendered and accepted over the government's objection, the government attorney will proceed to trial on all of the remaining counts not barred on double jeopardy grounds unless the Assistant Attorney

General, Tax Division, approves dismissal of the charges.

#### **5.12[5] Statements by Government Counsel at Sentencing; Agreeing to Probation**

A. Rule 32(a), Federal Rules of Criminal Procedure, permits government counsel to make a statement to the court at the time of sentencing. Counsel for the government should make a full statement of facts, including if applicable, the amount of tax evaded in all of the years for which a defendant was indicted; the means utilized to perpetrate and conceal any fraud; the past criminal record of the taxpayer; and all other information that the court may consider important in imposing an appropriate sentence.

B. When recommendations are made to the court on sentencing, the Tax Division prefers that government counsel request the imposition of a jail sentence in addition to the fine, together with costs of prosecution. In the usual situation, the payment of the civil tax liability, plus a fine, costs, and probation, does not constitute a satisfactory disposition of a criminal tax case.

C. Notwithstanding the foregoing, government counsel may agree to a sentence of probation (preferably with alternative conditions of confinement) when (i) the defendant pleads guilty, (ii) the sentencing guidelines range is 0-6 months (and within Criminal History Category I), and (iii) the United States Attorney personally, by signature, must approve a written memorandum to the case file setting forth the unusual and exceptional circumstances, warranting such agreement (for example, the need to secure cooperation against a more culpable party, or serious post-indictment degradation in the evidence available for trial such as the death of a witness or the loss or suppression of evidence). A copy of the United States Attorney's written determination must be supplied to the Tax Division at the same time the United States Attorney's office is required to notify the Division that the case has been closed.

#### **5.12[6] *Compromise of Criminal Liability/Civil Settlement.***

While statutory authority under 26 U.S.C. Sec. 7122(a) does exist for the Attorney General, after referral of a case to the Department, to enter into agreements to compromise criminal tax cases without prosecution, as a matter of longstanding policy, such authority is very rarely exercised. If it is concluded that there is a reasonable probability of conviction and that prosecution would advance the administration of the internal revenue laws, any decision to forego prosecution on the ground that the taxpayer is willing to pay a fixed sum to the United States, would be susceptible to the attack that the taxpayer was given preferential treatment because of his ability to pay whatever amount of money the government demanded.

Consequently, proposed criminal tax cases are reviewed without any consideration being given to the matter of civil liability or the collection of taxes, penalties, and interests. In short, proposed criminal tax cases are examined with the view to determining whether a violation has occurred to the exclusion of any consideration of civil liability.

Absent extraordinary circumstances, such as permanent loss of tax revenues unless immediate protective action is taken, settlement of the civil liability is postponed until after sentence has been imposed in the criminal case, except when the court chooses to defer sentencing pending the outcome of such settlement. In this event, the IRS should be notified so that it can begin civil negotiations with the defendant.

However, the Tax Division strongly encourages, but does not require, that a plea agreement include certain civil admissions by the defendant, including: (1) admission of either receipt of 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 that defendant is liable for the fraud penalty imposed by the Internal Revenue Code (26 U.S.C. Sec. 6663) on the understatements of liability for the years involved; and (3) an agreement by the defendant to file, prior to sentencing, complete and correct initial or amended personal returns for the years subject to the above admissions and, if requested, to provide the IRS with information regarding

the years covered by the returns and to pay, at sentencing, all additional taxes, penalties and interest which are due and owing and (4) an agreement by the defendant not to file thereafter 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, in the Tax Resource Manual.

---

#### 5.13 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.

---

#### 5.14 INTERSTATE AGREEMENT ON DETAINERS

As a corollary to Rule 20, attorneys should also be aware of The Interstate Agreement on Detainers, 18 U.S.C. App.2. This agreement addresses the issue of prisoners who are incarcerated on other charges in jurisdictions other than the jurisdiction in which charges are pending. Two areas are worthy of note.

First, Article III, Section (c) requires that the warden, commissioner of corrections, or other official having custody of the defendant "promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based." Therefore, it is critical that the prosecutor insure that the prisoner receives a copy of the indictment and provide a form notifying the prisoner of his right to make a request for final disposition.

In the event that the government has the prisoner transferred pursuant to a writ of habeas corpus, the prisoner must either be tried or must plead guilty before he is returned to the sending jurisdiction or the court is required to dismiss the outstanding charges. Section (d) provides that

If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

18 U.S.C. App.2, Article III(d).

Section 9 provides two special provisions which apply when the United States is a receiving State. That section provides:

(1) any order of a court dismissing any indictment, information, or complaint may be with or without prejudice. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: The seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a re prosecution on the administration of

the agreement on detainers and on the administrations of justice; and

(2) it shall not be a violation of the agreement on detainers if prior to trial the prisoner is returned to the custody of the sending State pursuant to an order of the appropriate court issued after reasonable notice to the prisoner and the United States and an opportunity for a hearing.

18 U.S.C. App. 2, Art. VII §9.

## 5.15 SENTENCING POLICIES

### 5.15[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. 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 U.S.A.M. 9-27.451. Normally, the government attorney in a tax case should not recommend that there be no period of incarceration. *But see* U.S.A.M. 6-4.340.

### 5.15[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 recognize that imposition of costs in criminal tax cases is mandatory and constitutional. *See, e.g., United States v. Jungels*, 910 F.2d 1501, 1504 (7th Cir. 1990); *United States v. Palmer*, 809 F.2d 1504, 1506-07 (11th Cir. 1987); *United States v. Saussy*, 802 F.2d 849, 855 (6th Cir. 1986); *United States v. Fowler*, 794 F.2d 1446, 1449 (9th Cir. 1986); *United States v. Wyman*, 724 F.2d 684, 688 (8th Cir. 1984); *United States v. Chavez*, 627 F.2d 953, 954-57 (9th Cir. 1980).

The policy statement on costs of prosecution in §5E1.5 states that "[c]osts of prosecution shall be imposed on a defendant as required by statute." The commentary to §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, 7216, and 7232 as among the statutes requiring the imposition of costs. USSG §5E1.5, comment. (backg'd) (emphasis added).

For offenses individuals commit on or after April 24, 1996, §5E1.3 mandates the following special statutory assessments *vis-a-vis* 18 U.S.C. § 3013:

- (A) \$100, if convicted of a felony;
- (B) \$25, if convicted of a Class A misdemeanor.

Section 8E1.3 authorizes the court to impose the costs of prosecution and statutory assessments upon organizations which commit felonies and Class A misdemeanors. The Tax Division strongly recommends that Government attorneys seek costs of prosecution in criminal tax cases. U.S.A.M. 6-4.350.

#### 5.15[3] *Government Appeal of Sentences*

Title 18 U.S.C. § 3742 permits sentences imposed under the 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;[FN22]
- b. When the sentence is imposed as a result of an incorrect application of the guidelines;[FN23]
- 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.[FN24]

18 U.S.C. §§ 3742(b)(1)-(4); *United States v. Giddings*, 37 F.3d 1091, 1093 (5th Cir. 1994). 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. *United States v. Hernandez*, 37 F.3d 998, 1000 (n.3) (11th Cir. 1994). However, any further actions require the approval of the Solicitor General. U.S.A.M. 2-2.121

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. 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 forward a recommendation to the Tax Division, along with accompanying documentation, promptly, preferably with two days of imposition of sentence. U.S.A.M. 2-2.111

#### 5.16 *RESOLUTION OF CIVIL LIABILITY DURING THE CRIMINAL CASE*

##### 5.16[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. U.S.A.M. 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. U.S.A.M. 6-4.360.

The Tax Division may accept a plea agreement which includes certain civil admissions by the defendant: [\[FN25\]](#)

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. [\[FN26\]](#)
3. An agreement by the defendant that he or she will file, prior to the time of sentencing, initial or amended 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, and, if requested, will 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.

U.S.A.M. 6-4.360

#### **5.16[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).

---

FN 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.

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

FN 3. In order to "provide increased deterrence for tax offenses," USSG App. C, Amend. 491, p. 338, an amendment to §2T4.1, effective November 1, 1993, essentially increased the tax table by two levels throughout. This amendment has had the effect of (1) increasing the average period of incarceration by six months, and (2) reducing the likelihood that a tax crime defendant will receive an alternative type of incarceration. For example, under the tax table in effect prior to November 1, 1993, a tax loss of more than \$10,000 provided an offense level of 9, with a sentencing range of 4-10 months. Under the current tax table, however, a tax loss of over \$8,000 but less than \$13,500 provides an offense level of 10, with a sentencing range of 6-12 months.

The amended tax table applies to offenses committed on or after November 1, 1993, and to offenses beginning before and continuing after that date. Because the penalties under the current tax table are harsher than in prior years, the *ex post facto* clause likely prevents use of the current tax table for sentencing for conduct which occurred before November 1, 1993.

FN 4. *N.B.* The Sentencing Commission, in response to the concerns expressed in the *Hunelach*, *Hopper*, and *Pollen* cases, has enacted an amendment providing for the inclusion of interest and penalties in willful evasion of payment and willful failure to pay cases pursuant to 26 U.S.C. 7201 and 7203, respectively. Absent prior contrary congressional action, this new amendment will become effective on November 1, 2001.

FN 5. *N.B.* In an amendment scheduled to take effect on November 1, 2001, the Sentencing Commission has now resolved the circuit split described in the text in favor of the *Cseplo* approach.

FN 6. This application note most likely represents a clarification of existing law, rather than a substantive change. See *United States v. Harvey*, 996 F.2d 919, 920 (7th Cir. 1993).

FN 7. The pre-November 1, 1993 version of §2T1.4, however, directs the sentencing court to employ the tax loss definition provided in now-deleted §2T1.3.

FN 8. As indicated to the introductory material to this chapter, the theft, property destruction and fraud guidelines are being consolidated into a new guideline, USSG § 2B1.1, as of November 1, 2001, as part of the Sentencing Commission's Economic Crime Package.

FN 9. The pre-November 1, 1993 version of §2T1.9 directs the sentencing court to use the base offense level dictated by either §2T1.1 or now-deleted §2T1.3, whichever is applicable to the underlying conduct, if that offense level is greater than 10.

FN 10. This commentary was amended on November 1, 1993 in order to include a reference to offenses under foreign law. USSG App. C, Amend. 491. Presumably, this amendment was responding to the opinion of the Ninth Circuit in *United States v. Ford*, 989 F.2d 347, 350- 51 (9th Cir. 1993), which held that a sentencing court could not increase the base offense level of a defendant for a failure to report income derived from criminal activity in Canada.



FN 11. The opinion contains an apparent error, stating that the income figure "was derived by subtracting sales price from cost of goods sold," 141 F.3d at 1343, thereby reversing the calculation.

FN 12. *N.B.* By amendment effective November 1, 2001, this enhancement once again will be called "sophisticated means" and will carry a floor offense level of 12. These changes are designed to conform the sophistication offense characteristic in the tax guidelines to the "sophisticated means" enhancement in the fraud guidelines.

FN 13. In *United States v. Kraig*, 99 F.3d 1361, 1371 (6th Cir. 1996), the Sixth Circuit held that, if several persons were involved in the scheme at issue, this enhancement requires a court to focus only upon the individual actions of the defendant. In contrast, the Second Circuit ruled in *United States v. Lewis*, 93 F.3d 1075, 1083-84 (2d Cir. 1996), that this enhancement focuses upon the complexity of the overall scheme, rather than the particular actions of an individual defendant. See also *United States v. Richman*, 93 F.3d 1085, 1088 (2d Cir. 1996) (enhancement is an offense characteristic, not specific offender characteristic). The November 1, 1998 amendment to this enhancement indicates that the Sentencing Commission rejects the holding in *Kraig*.

FN 14. *United States v. Gunby*, 112 F.3d 1493 (11th Cir. 1997); *United States v. Horton*, 98 F.3d 313 (1996); *United States v. Heckman*, 30 F.3d 738 (6th Cir. 1994) (upward departure justified on this basis where defendant filed at least 79 false IRS Form 1099's); *United States v. Flinn*, 18 F.3d 826 (10th Cir. 1994) (one-point enhancement under this provision does not preclude another one-point increase for financial loss to Government); *United States v. Kikumura*, 918 F.2d 1084 (3d Cir. 1990).

FN 15. As amended effective November 1, 1998, "'Significantly reduced mental capacity' means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful." USSG §5K2.13, comment., n.1.

FN 16. *United States v. Aerts*, 121 F.3d 277, 279 (7th Cir. 1997); *United States v. Besler*, 86 F.3d 745 (7th Cir. 1997).

FN 17. In making this determination, a court may include relevant conduct. A sentencing court may upwardly depart on the basis of conduct in dismissed counts. *United States v. Baird*, 109 F.3d 856, 862 (3d Cir. 1997). The sentencing court may also enhance a tax evader's sentence because of uncharged criminal conduct against a company, when the evader occupied a position of trust, even though the company was not his victim. *United States v. Cianci*, 154 F.3d 106, 112 (3d Cir. 1998).

FN 18. *But see United States v. Lipman*, 133 F.3d 726, 730 (9th Cir. 1998) (holding "cultural assimilation" a basis for downward departure).

FN 19. Conversely, however, a defendant's refusal to assist authorities may not be considered an aggravating sentencing factor. USSG §5K1.2.

FN 20. See 18 U.S.C. § 3553(c).

FN 21. 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).

FN 22. *United States v. Hardy*, 101 F.3d 1201 (7th Cir. 1996);

*United States v. Underwood*, 61 F.3d 306, 308 (5th Cir. 1995);  
*United States v. Nnanna*, 7 F.3d 420 (5th Cir. 1993); *United States v. Piche*, 981 F.2d 706 (4th Cir. 1992); *United States v. Lopez*, 974 F.2d 50 (7th Cir. 1992).

FN 23. *Williams v. United States*, 503 U.S. 1193 (1992); *United States v. Burnett*, 66 F.3d 137 (7th Cir. 1995); *United States v. Soltero-Lopez*, 11 F.3d 18 (1st Cir. 1993).

FN 24. *United States v. Giddings*, 37 F.3d at 1093. 40. FN 25. Although it is not mandatory, the Tax Division strongly urges that any plea agreement in a tax case include these admissions and agreements.

FN 26. 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.