

Tax Defense Attorneys Wary of DOJ Sentencing Update Stance

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By Nathan J. Richman

Tax prosecutors shouldn't overuse exceptions to a first-offender sentencing guidelines reduction to counteract the intended benefit, defense lawyers told *Tax Notes*.

An amendment to the U.S. Sentencing Guidelines Manual that takes effect November 1 will include a new two-level reduction for true first offenders having their first contact with the criminal justice system. The reduction is likely to be in play for many criminal tax cases.

Samuel Lyons of the Justice Department Tax Division [discussed the upcoming change](#) May 6 at the American Bar Association Section of Taxation meeting and noted that the reduction will include an exception for defendants who are subject to the aggravating factor sentencing enhancement. The attorney suggested that Tax Division prosecutors will search more aggressively for defendants subject to aggravating role enhancements and likely will be reticent to negotiate those enhancements away.

Brian P. Ketcham of Ketcham PLLC told *Tax Notes* that he finds it troubling that the Tax Division seems to view the guidelines as allowing attempts to undo the sentencing commission's policy decision.

"For unelected prosecutors to view that policy decision as a threat to them and [say] that they'll deliberately seek enhancements that they would never have otherwise thought [of] to punish people and to expose them to more prison time, I think is very troubling," Ketcham said. While the Tax Division hasn't issued an official policy, public statements like those made at the ABA meeting are meaningful, he said.

Kevin F. Sweeney of Chamberlain, Hrdlicka, White, Williams & Aughtry said he agrees that tax investigators and prosecutors shouldn't work harder to find sources of aggravation to justify that enhancement just to counteract the new first-offender reduction. Tax prosecutors shouldn't try to counteract the benefit of the new rule using other guidelines and leave the preexisting prosecutorial discretion regarding aggravation in place, he said.

Ketcham said he has heard other tax defense attorneys complain about potential overuse of the aggravation enhancement to counteract the first-offender reduction. The tax code is a sophisticated set of rules, so Ketcham asked will anything involving taxes always involve sophisticated means — one of the aggravating factors under the sentencing guidelines?

Most tax defendants aren't all that sophisticated, according to Ketcham. They're usually individual taxpayers lying on tax returns or underreporting income rather than participants in complex and

well-organized schemes, he said.

This isn't the first time the Tax Division has [raised eyebrows](#) with a sentencing announcement at a conference in recent years. A [Tax Division official said](#) in December 2017 that prosecutors would start arguing for the use of account value rather than tax loss in criminal foreign bank account report cases, and defense attorneys responded by raising transparency and consistency concerns.

Zero-Point Offenders

Sandra R. Brown of Hochman Salkin Toscher Perez PC said the creation of a new "zero-point offenders" category "may be one of the most significant changes to federal sentencing since the Supreme Court's decision in *Booker*."

In *Booker v. United States*, 514 U.S. 220 (2005), the Supreme Court declared the sentencing guidelines to be advisory rather than mandatory. Under the guidelines, the court calculates a defendant's offense level using characteristics of the offense and sentencing enhancements and reductions. That numerical value is then compared with a table that includes different offender categories based on how much prior criminal justice system activity is associated with the defendant to find a suggested sentencing range.

"In essence, the commission has created a new criminal history category of 'zero' that is two points lower than the current" Category I, Brown said in an email. "In technical terms, the result will be that those defendants charged with a tax loss of \$250,000 or less, which is an Offense Level of 16 or below, after acceptance of responsibility and irrespective of any downward variances pursuant to Section 3553(a), will be placed into a Zone A or Zone B, either of which authorizes a sentence of probation," she explained.

Sweeney also praised the guidelines change for both encapsulating what the tax defense bar has seen on recidivism and quantifying the effect.

While it may be fair for prosecutors to argue that the quantification of a two-level reduction should prevent a defendant from asking for further downward variance based on a first offense — as the Tax Division official said will happen — defense counsel will still be able to argue that a first offense also shows a crime inconsistent with the defendant's life history, Sweeney said. Both the prosecution and the defense will have arguments to make about the effect of the reduction on other variances, he said.

Ketcham agreed that the new quantification of first-offender status in the two-level reduction won't stop defense attorneys from requesting further downward variances. Because the Justice Department always asks for sentences within the guidelines range, the quantification shouldn't change much in the variance arguments, he said.

Passing Time

Lyons, the Tax Division official who spoke at the ABA meeting, said the first-offense reduction will affect criminal tax case selection.

Brown predicted the same: "In practical terms, we should expect that the IRS's public mandate that the civil side [focus on the very wealthy](#), noncompliant taxpayer will most likely be further mirrored by its Criminal Investigation division."

Sweeney noted that the IRS and its Tax Division want criminal cases to result in prison sentences to maximize their deterrence effect. Hopefully that will mean focusing more energy on finding cases with existing aggravating factors rather than on finding aggravating factors in existing cases, he said.

The government may also further emphasize tax conspiracy charges under 18 U.S.C. section 371 to take account of the new sentencing guidelines, according to Sweeney.

Ketcham wasn't so sanguine about the possibility of the sentencing change affecting case selection and charging decisions. He said he doesn't anticipate much impact on case selection from a sentencing change that would come into play two years after indictment.

It isn't yet clear how the amendment will affect case selection in criminal tax cases, and it will be hard for that to change with time because it won't be easy to quantify the cases not charged, Ketcham said. Charging deliberations aren't public, and it seems unlikely that the Justice Department will publish statistics on uncharged cases, he said.

Both Ketcham and Sweeney said they anticipate tax defense counsel raising the upcoming change before it takes effect and asking for adjournments or continuances that would place sentencing hearings after that date.

The sentencing commission's judgment about first-time offenders should make for a good variance argument ahead of November 1, Sweeney said.

Ketcham was more forceful, saying the sentencing commission didn't point to anything special about setting November 1 as the effective date. Hopefully, sentencing judges will consider the new policy ahead of the official change, he said.