



8-1-2014

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### Recommended Citation

John A. Townsend, *Tax Evaded in the Federal Tax Crimes Sentencing Process and Beyond*, 59 Vill. L. Rev. 599 (2014).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol59/iss3/6>

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TAX EVADED IN THE FEDERAL TAX CRIMES SENTENCING  
PROCESS AND BEYOND

JOHN A. TOWNSEND\*

I. INTRODUCTION

A. *Scope—Taxes in the Criminal Tax Enforcement System*

THIS Article discusses the role of taxes in the federal criminal tax enforcement system. The centerpiece of the federal criminal tax enforcement system is the tax evaded. Even when a criminal charge does not have an element of tax evaded, the Government's incentive to bring criminal tax charges is very low when there is no material amount of tax evaded.<sup>1</sup> The role of the amount of tax evaded results in some degree of proportionality and implements the commonly stated concern that the punishment fit the crime; as the reader might suspect, proportionality in the tax crimes universe means that the more tax evaded, the more punishment.<sup>2</sup>

In this Article, I address the various guises in which tax evaded appears in federal tax crimes sentencing. Tax evaded must appear in the guilt determination phase for the crime of tax evasion under 26 U.S.C. § 7201. Tax evaded is an element of the crime. The remaining tax crimes

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\* Partner, Townsend & Jones, L.L.P. Significant parts of this outline have been drawn—often verbatim—from the author's current working draft of the next edition of his self-published text titled *Federal Tax Crimes*. The 2013 first edition of this text is available on SSRN. See John A. Townsend, *Federal Tax Crimes* (Working Paper, 2013), available at <http://ssrn.com/abstract=2212771> or <http://dx.doi.org/10.2139/ssrn.2212771>. All such materials are used without further attribution by express permission of the author, being me. I have benefitted greatly in this presentation from Peter Hardy's comprehensive publication: PETER D. HARDY, *CRIMINAL TAX, MONEY LAUNDERING AND BANK SECRECY ACT LITIGATION* (2010).

1. See 26 U.S.C. § 7201 (2012). An oft-theorized issue is whether the tax evaded element of the crime of tax evasion, under section 7201, can be met with an insubstantial or immaterial amount of tax evaded. If the statute were read literally, a taxpayer evading \$1.00 of tax could be convicted. Perhaps reflecting the concern that the law does not deal with trifles or, at least that juries will not convict for trifles, some courts require that the tax evaded be substantial and some pattern jury instructions to direct the jury. See, e.g., *United States v. Helmsley*, 941 F.2d 71, 83–84 (2d Cir. 1991) (“We have also required a showing that the deficiency was substantial.”). Some courts, however, read the statute literally and can find no substantiality requirement for tax due and owing. See, e.g., *United States v. Daniels*, 387 F.3d 636, 639–41 (7th Cir. 2004) (involving, however, substantial tax evaded).

2. It is perhaps an overstatement to say no tax, no crime. Or perhaps no tax, no prosecution; or even no tax, no punishment. And, to insert proportionality, little tax, little punishment; or much tax, much punishment. In a nutshell, that is how the Sentencing Guidelines work. *United States v. Booker*, 543 U.S. 220 (2005), changes the rigidity in the Guidelines' sentencing by the numbers approach, but because the Guidelines are the starting point (and often the ending point) for sentencing, understanding proportionality based on the tax evaded is important.

do not have tax evaded as an element;<sup>3</sup> hence tax evaded may or may not surface as a key issue in the guilt determination phase in prosecutions for those crimes. But, for all tax crimes, tax evaded is a critical and necessary component of sentencing.

For purposes of this Article, I make two key assumptions at the outset. First, I assume that the taxpayer is the actor in the tax evaded; the taxpayer is the defendant in this Article. Enablers such as return preparers and promoters can also be charged with tax crimes where the tax evaded is tax owed by others.<sup>4</sup> I do not discuss enablers, but the concepts discussed in this Article with respect to the taxes involved would apply equally in that setting as well.

Second, I assume that the tax evaded was in the context of underreporting and underpayment with respect to the taxpayer's return filing obligation. This generally would be underreporting and underpayment with respect to a filed tax return, although it could occur with respect to a failure to file with an underpayment. Tax evasion can occur with respect to assessed taxes, but I do not deal here with that type of evasion—called evasion of payment. The most common form of evasion encountered by most practitioners relates to evasion of assessment accomplished by underreporting and underpayment, the intended consequence of the underreporting.

### B. *The Criminal Justice System*

Our criminal justice system is multi-faceted. At its most basic level, it punishes conduct that violates norms imposed by society through criminal laws. But, the criminal justice system has significant goals other than punishment. In the federal system, these various goals are summarized as “deterrence, incapacitation, just punishment, and rehabilitation.”<sup>5</sup> The latter three aspects deal with the individual before the court. The first deals

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3. The Internal Revenue Code has a number of tax crimes, but the principal crimes encountered in practice are 26 U.S.C. §§ 7206(1) (often referred to as tax perjury), 7206(2) (aiding and assisting), 7203 (failure to file), and 7212(a) (tax obstruction). These crimes do not have a textual requirement of evaded tax.

4. For example, in the prominent tax shelter prosecutions in the last ten years, tax shelter enablers with major law and accounting firms were convicted for evading the taxes of their clients. *See, e.g.*, *United States v. Coplan*, 703 F.3d 46 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 71 (2013); *United States v. Pfaff*, 407 F. App'x. 506 (2d Cir. 2010); *United States v. Daugerdas*, No. S3 09 CR 581, 2012 WL 92293 (S.D.N.Y. Jan. 11, 2012).

5. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (2013). This highly summarizes the factors set forth in the governing statute. *See* 18 U.S.C. § 3553(a) (2012). All references hereafter to the U.S. Sentencing Guidelines Manual are cited to the manual for 2013 (effective November 1, 2013), which was the most current version at the time this Article was prepared. Hence, for example, the key tax Guideline will be cited as U.S. SENTENCING GUIDELINES MANUAL § 2T1.1. Notably absent from the sentencing factors is the “quality of mercy.” *See* WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1.

with deterrence of others. Deterrence is a critical part of the criminal tax enforcement system.

### C. *The Criminal Tax Enforcement System*

The criminal tax enforcement system must be understood in the context of the role it plays in the tax system. The tax system raises revenue for the Government. The Government could not function if it could not raise revenue.<sup>6</sup> Our tax system creates a number of incentives<sup>7</sup> for taxpayers to participate in the tax system and to pay their tax liabilities as, to paraphrase Justice Holmes, the cost they pay for a civilized society.<sup>8</sup> I deal here principally with the criminal enforcement incentives.

The role of the criminal tax enforcement system is summarized as follows:

The Government helps to preserve the integrity of this Nation's self-assessment tax system through vigorous and uniform criminal enforcement of the internal revenue laws. Criminal prosecutions punish tax law violators and deter other persons who would violate those laws. To achieve maximum deterrence, the Government must pursue broad, balanced, and uniform criminal tax enforcement. Uniformity in tax cases is necessary because tax enforcement potentially affects more individuals than any other area of criminal enforcement. Broad and balanced enforcement is essential to effectively deter persons of varying economic and vocational status, violators in different geographic areas, and different types of tax law violations.<sup>9</sup>

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6. *Bull v. United States*, 295 U.S. 247, 259 (1935) (“[T]axes are the lifeblood of government, and their prompt and certain availability an imperious need.”).

7. Okay, these are commonly called penalties rather than incentives, but they serve that function.

8. *See* *Compania General de Tabacos de Filipinas v. Collector*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting). Taxes even have important religious aspects. Jesus famously said that we should “give back to Caesar what is Caesar’s, and to God what is God’s.” *Matthew* 22:21 (New International Version). Perhaps inspired by Jesus, in 2007, Pope Benedict was reported to be preparing a doctrinal pronouncement in his second encyclical—the encyclical being the most authoritative statement the Pope makes—asserting that evading taxes is “socially unjust.” *Benedict’s 2nd Encyclical Said to Condemn Tax Evasion by Wealthy as ‘Socially Unjust’*, CATHOLIC ONLINE (Aug. 13, 2007), [http://www.catholic.org/international/international\\_story.php?id=25018](http://www.catholic.org/international/international_story.php?id=25018). Indeed, even before this, the Catholic Church ascribed tax evasion as a violation of the Seventh Commandment. *See* CATECHISM OF THE CATHOLIC CHURCH, pt. 3, sec. 2, *Exodus* 20 2-17, available at [http://www.vatican.va/archive/ccc\\_css/archive/catechism/command.htm](http://www.vatican.va/archive/ccc_css/archive/catechism/command.htm) (“You shall not steal.”). So, there are religious, social, and moral imperatives to paying taxes. Alas, however, I deal in the text only with the legal aspects of paying taxes and obligations—such as reporting taxes—related thereto.

9. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 6-4.010 (2007) [hereinafter USAM], available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/index.html](http://www.justice.gov/usao/eousa/foia_reading_room/usam/index.html). This portion of the USAM is incorporated by reference in chapter 2.00 of the Department of Justice Tax Division (DOJ Tax)

Similarly, and more succinctly, the Internal Revenue Service (IRS) division responsible for investigating tax crimes, Criminal Investigation (CI)—often referred to as the Criminal Investigation Division (CID)<sup>10</sup>—explains its role as follows: “Criminal Investigation serves the American public by investigating potential criminal violations of the Internal Revenue Code (IRC) and related financial crimes in a manner that fosters confidence in the tax system and compliance with the law.”<sup>11</sup>

#### D. *The Tax System in the Sentencing Process*

The Introductory Comment to the key starting point for the Sentencing Guidelines calculations for tax crimes states:

The criminal tax laws are designed to protect the public interest in preserving the integrity of the nation’s tax system. Criminal tax prosecutions serve to punish the violator and promote respect for the tax laws. Because of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a primary consideration underlying these guidelines. Recognition that the sentence for a criminal tax case will be commensurate with the gravity of the offense should act as a deterrent to would-be violators.<sup>12</sup>

The tax evaded—in sentencing jargon, the object of the criminal tax offense—serves to ensure that “the sentence for a criminal tax case will be commensurate with the gravity of the offense” and “act as a deterrent to would-be violators.”<sup>13</sup>

#### E. *Tax Liability Concepts in the Criminal Tax Universe*

I stated earlier that tax evaded is the centerpiece of the sentencing in criminal tax cases and, hence, is at the forefront from the earliest steps in the criminal investigation and enforcement process, where practitioners must anticipate and, if possible, shape what will happen at sentencing. I will first state generally the varying concepts of tax liability as they play out in the criminal tax context and specifically at sentencing. The key deter-

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Criminal Tax Manual (CTM). See U.S. DEP’T OF JUSTICE, CRIMINAL TAX MANUAL § 2.00 (2012) [hereinafter DOJ CTM], available at <http://www.justice.gov/tax/readingroom/2008ctm/CTMTOC.pdf>. Note that the 2008 reference in the URL is misleading.

10. This criminal investigative branch of the IRS was formerly named Criminal Investigation Division, but the name was shortened to Criminal Investigation. Nevertheless, it is still often referred to as CID.

11. IRS, *Criminal Investigation’s Mission*, IRM 9.1.1.2 (Nov. 4, 2004), available at [http://www.irs.gov/irm/part9/irm\\_09-001-001.html](http://www.irs.gov/irm/part9/irm_09-001-001.html) (detailing Criminal Investigation’s Mission).

12. U.S. SENTENCING GUIDELINES MANUAL ch. 2, pt. T, intro. cmt. (2013).

13. *Id.*

minant in the advisory Sentencing Guideline calculations for financial crimes is the financial loss to the victim.<sup>14</sup> For taxes, the victim is the IRS; the financial loss to the IRS is the tax loss which is, as will be discussed, the principal determinant of Guidelines calculations for tax sentencing.

### 1. *Civil Tax Liability and Tax Deficiency*

A taxpayer may think of tax liability as what a taxpayer offers to the IRS. In the case of a filed return, the return is the taxpayer's offer. In the case of an unfiled return, the taxpayer's offer is nothing (except to the extent of prepayments such as withholding or estimated taxes). In either case, the IRS may disagree and think the taxpayer owes more than the taxpayer has offered. That is the context for IRS investigations into liability that may include both audits and criminal investigations.

The taxpayer will have a civil tax liability which is imposed on the original due date of the return.<sup>15</sup> That liability is determined before application of payments. To the extent that the liability exceeds the payments made or deemed made as of the due date of the return, the taxpayer has an unpaid civil tax liability, often referred to in a civil context as a deficiency.<sup>16</sup> Taxpayers who fully pay their civil tax liability will usually not be at risk of criminal prosecution because of the phenomenon noted above that punishment is determined by evasion of the unpaid tax.<sup>17</sup> At least *usually*, in the tax crimes universe, if there is no tax underpaid, there is no crime—or at least no crime that the Government will have the incentive to prosecute.<sup>18</sup>

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14. See *United States v. Babul*, 476 F.3d 498, 502 (7th Cir. 2007) (discussing Guidelines for fraud and theft offenses).

15. See 26 U.S.C. § 6151(a) (2012).

16. See *id.* § 6211(a) (providing definition of “deficiency”). All references hereinafter to sections are to the Internal Revenue Code of 1986 unless otherwise noted.

17. This is a bit too broad of a statement. Taxpayers who fully report their liability but do not fully pay because, often, they are unable to do so, have no risk of prosecution from the mere fact that they do not pay. If they take action to avoid paying the unpaid but reported taxes, then they may be criminally prosecuted either for evasion of payment or one of the tax obstructive crimes—such as 26 U.S.C. § 7212(a) or its conspiracy counterpart, the *Klein* defraud conspiracy, 18 U.S.C. § 371. Then, taxpayers will have nonpayment of the taxes as an object of their criminal offense and the punishment can be made to fit the crime. The *Klein* conspiracy, named for the leading case, is the defraud conspiracy described in section 371, appearing in a tax setting. See *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957); see also 18 U.S.C. § 371 (2012). It is a term of art for the conspiracy to impair or impede the lawful functions of the IRS.

18. At the risk of too much brevity to support this statement, given the relationship of the amount of tax evaded to the sentence, the Government is unlikely to prosecute a taxpayer with no tax evaded even if his conduct meets the technical definition of a crime that has no element of tax evaded. For example, tax perjury under section 7206(1) does not require tax to have been evaded. The reason is that the Guidelines—even with 18 U.S.C. § 3553(a)/Booker discretion—generally would require no incarceration, and, without incarceration, the message from the conviction and sentence would be weak. See generally *United States v. Booker*, 543

The actual unpaid tax liability—the deficiency as the Code defines it—is not directly the key concept in tax crimes and sentencing. The term deficiency does not describe the tax, if any, a taxpayer intended to evade. It is simply the unpaid tax. The taxpayer may have intended to evade some or all of the deficiency.<sup>19</sup> Unfortunately, the term deficiency is used by many cases to describe the portion of the deficiency that the taxpayer intended to evade—what I call the tax evaded.<sup>20</sup> In order to keep the statutory term of art distinct, I use the term deficiency as used in the statute to mean the unpaid civil tax liability and will use a different term for the portion of the deficiency the taxpayer intended to evade for the reasons I now discuss.

2. *The Tax the Taxpayer Intended to Evade—The Criminal Tax Numbers or Figures*

I think it helpful to illustrate the concepts in an example. Assume that, for civil tax purposes, the taxpayer had \$100,000 of income that the taxpayer failed to report and pay. Assume that the tax liability on that omitted income is \$35,000; that liability is the deficiency. The \$100,000 omitted income consists of two items—\$50,000 of embezzlement income which the taxpayer knew was taxable and chose not to report and \$50,000 of personal injury income that the taxpayer thought or could have reasonably thought was excludable under section 104 but which, for technical reasons, is not properly excludable under that section. In calculating the tax evaded as an element of tax evasion, the Government will compute the tax only on the \$50,000 of embezzlement income and will not include the \$50,000 of personal injury income. So, let's say the tax on \$50,000 of embezzlement income is \$17,500. The criminal tax number for establishing the evaded tax element in a tax evasion case is \$17,500 (even though the deficiency is \$35,000). The Government must prove the evaded tax beyond a reasonable doubt.

I need to explain now my use of the term evaded tax. Section 7201 describes the crime of tax evasion as a willful attempt “to evade or defeat any tax imposed by” title 26.<sup>21</sup> It does not refer to the tax deficiency

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U.S. 220 (2005). The Government's priorities thus focus the limited number of tax prosecutions it can pursue on taxpayers who have not only tax evaded, but substantial tax evaded.

19. See 26 U.S.C. § 6663. This concept of dividing the tax deficiency between the portions attributable to tax evasion and not attributable to tax evasion is recognized in section 6663, the civil penalty counterpart to section 7201 evasion. See 26 U.S.C. § 7201. Section 6663 imposes the civil fraud penalty only on the portion of the tax attributable to fraud. See 26 U.S.C. § 6663(b).

20. See, e.g., *Boulware v. United States*, 552 U.S. 421, 432 n.9 (2008). The Court said that, although section 7206(1) requires no proof of a “tax deficiency,” proof of features of a tax deficiency may be critical in the prosecution. *Id.* In October 2013, I did a LEXIS-NEXIS federal court search in the combined federal court cases database on “7201 w/20 ‘tax deficiency’” and obtained 277 hits, including several Supreme Court cases in addition to *Boulware*.

21. 26 U.S.C. § 7201.

which, as noted above, has a defined meaning in the Code that is not the same as evaded tax. To be sure, courts—including the Supreme Court—often refer to the evaded tax element as tax deficiency.<sup>22</sup> Because of the different Code meaning of the term tax deficiency, I think use of deficiency for the evaded tax element is confusing. The evaded tax element is sometimes described as the tax “due and owing”—sometimes shortened to just “tax due.”<sup>23</sup> I find this formulation less descriptive of the evaded tax, because just based on the words used it might be interpreted the same as tax deficiency. In this Article, I will use the term evaded tax because I think it is more descriptive of the evasion element and because it permits better development of the other concepts I discuss in this Article.<sup>24</sup>

Evaded tax is not the tax deficiency which is the civil tax number; it is instead the part of the tax deficiency the taxpayer intended to evade. In the example, the deficiency would include the \$50,000 personal injury income, which, let’s say, doubles the tax deficiency to \$35,000. The deficiency is never less than the criminal tax number (referred to here as the evaded tax) and is often more because of the phenomenon I just mentioned—i.e., some components entering the deficiency may not be items resulting in evaded tax.

Finally, as I develop in the example, the evaded tax is the portion that would be the element of the crime of tax evasion, which is the issue decided in the guilt determination phase before sentencing. This Article does not discuss the guilt determination phase, but I think the foregoing

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22. See *Boulware*, 552 U.S. at 432 n.9. For a discussion of courts’ references to the evaded tax element as tax deficiency, see *supra* note 20 and accompanying text.

23. See, e.g., *United States v. Scheuneman*, 712 F.3d 372, 375 (7th Cir. 2013) (“[T]ax due and owing . . . .”); DOJ CTM, *supra* note 9, *Government Proposed Jury Instruction No. 26.7201-3*, available at <http://www.justice.gov/tax/readingroom/2008ctm/CTM%20JI%20-%20Title%2026.pdf> (“[T]axes due and owing . . . .”); DOJ CTM, *supra* note 9, *Government Proposed Jury Instruction No. 26.7201-1*, available at <http://www.justice.gov/tax/readingroom/2008ctm/CTM%20JI%20-%20Title%2026.pdf> (“[T]ax due . . . .”). For additional discussion of this issue, see Jack Townsend, *For Tax Evasion, Is the Element “Tax Deficiency” or “Tax Due and Owing,”* FED. TAX CRIMES BLOG (Oct. 14, 2013, 9:46 AM), <http://federaltaxcrimes.blogspot.com/2013/10/for-tax-evasion-is-element-tax.html>. I also will have an expanded discussion of this issue in the next published version of my FEDERAL TAX CRIMES text, which will be available, when published on my SSRN site later in 2014.

24. My dislike of the use of the term deficiency to mean the tax the taxpayer intended to evade could be semantics if the term deficiency is considered in the context of a criminal prosecution. Because each element of a crime must be proved beyond a reasonable doubt, necessarily the tax evasion component of the prosecution must exclude the portion of the deficiency that the taxpayer did not intend to evade. Stated otherwise, when the element is stated as just the deficiency, it necessarily, because of the burden of proof, means only the portion of the civil tax deficiency that the taxpayer intended to evade. I just prefer to avoid this type of semantic uncertainty and use terms that are more descriptive of their functions in the similar but not exactly parallel civil and criminal universes. I will admit that my term “tax evaded” does conflate the willfulness element with the tax that the taxpayer intended to evade. I do not think that possible conflation is critical to this Article, because the crime of tax evasion is not the focus.

example illustrates the concept of tax evaded for that purpose. The tax evaded concept does carry forward into the sentencing phase via two key concepts—the sentencing tax loss, which is the principal driver of the sentence, and restitution.

### 3. *Sentencing Tax Loss*

The Sentencing Guidelines use “tax loss” as the principal component in the advisory guideline sentencing range for a defendant convicted of one or more tax or tax related crimes. The Sentencing Guidelines define tax loss as “the total amount of loss that was the object of the offense . . . .”<sup>25</sup> It is the same as the tax the taxpayer intended to evade—“tax evaded” as I use the term.<sup>26</sup> There are some key nuances in the tax loss concept in the Guidelines that may cause the tax loss to exceed the tax evaded number used in the guilt determination phase. First, because sentencing findings (including tax loss) are determined by a preponderance of the evidence rather than beyond a reasonable doubt, the evaded tax for Sentencing Guidelines purposes may include more components than tax evaded for guilt of the crime of tax evasion.<sup>27</sup> Second, the tax loss can include tax loss for “relevant conduct”—other related crimes for which

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25. U.S. SENTENCING GUIDELINES MANUAL § 2T1.1(c)(1) (2013); *see also id.* § 2T1.1 cmt. n.1 (“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.”). Translated into terms used here, that means that the Government must prove tax evaded by a preponderance of the evidence rather than beyond a reasonable doubt. I should note one nuance that I do not deal with in the text. The tax loss is the loss that occurred or would have occurred had the object been achieved. In the situation discussed in the text, an evasion resulting from the filing of a return underreporting the tax liability, the taxpayer achieves the benefit of the evasion by not reporting and paying the tax. What if, however, the conduct giving rise to the evasion was intended to report and pay less tax in future years—for example, the fraudulent claiming of purchase of a depreciable asset that could be depreciated or amortized over, say, twenty years, and the taxpayer is prosecuted in year 2003 for evasion from claiming the false depreciation in years 2001 and 2002? As it is articulated, such an unrealized but intended tax evasion might be included in the tax loss. Consider a taxpayer who files 1,000 fraudulent claims for refund, which, if granted, would have generated refunds of \$100 million. The IRS never grants the refunds. The tax loss is \$100 million. *See, e.g.,* United States v. Eye, 520 F. App’x 852 (11th Cir. 2013). Compare that to a taxpayer who commits the evasion by underreporting and never paying the tax at all. That taxpayer’s tax loss is \$100 million. In terms of culpability, are these two evasions the same as the calculation of the tax loss seems to suggest? Consider a similar example using the depreciation scenario above, where the taxpayer receives the full tax loss in the first two years. Are they the same in terms of culpability?

26. U.S. SENTENCING GUIDELINES MANUAL § 2T1.1 cmt. n.1 (2013). Application Note 1 says: “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.” *Id.* The criminal figure is the same as tax evaded as I use this term.

27. I illustrate this in an example in the next paragraph of the text.

the defendant was not convicted.<sup>28</sup> The relevant conduct concept is described as the cornerstone of the Guidelines (although consistent with pre-Guidelines sentencing practice) and plays a major role in tax cases where multiple years or events may be involved.<sup>29</sup>

Consider this example: The indictment alleges that the taxpayer evaded \$100,000. That means that the prosecutors believe they can prove beyond a reasonable doubt that the taxpayer evaded \$100,000. The taxpayer is convicted on that basis. Suppose, however, that, for sentencing purposes, the Government can prove by a preponderance of the evidence that the taxpayer really evaded \$200,000, but did not allege the additional \$100,000 in the indictment because it did not believe that it could prove that additional amount beyond a reasonable doubt. Further, suppose that the taxpayer's real unpaid civil tax liability for the year is \$300,000, with the additional \$100,000 representing items for which the Government cannot prove the taxpayer intended to evade under any standard of proof. There are three concepts related to the overall unpaid civil tax liability. In the order presented, they are: (i) the evaded tax—the “criminal number”—of \$100,000 used for purposes of charging and convicting for evasion; (ii) the evaded tax for sentencing purposes—the tax loss—of \$200,000, consisting of the evaded tax of \$100,000, proved beyond a reasonable doubt, and the evaded tax of \$100,000 proved by a preponderance of the evidence; and (iii) the residual tax of \$100,000 not related to tax evasion for any criminal purpose (i.e., it solely affects civil tax liability).<sup>30</sup> The three components in the aggregate represent the civil tax lia-

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28. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2013). The Guidelines define relevant conduct as all acts or omissions (broadly defined to include conspiracies, aiding and abetting, etc.) “that were part of the same course of conduct or common scheme or plan as the offense of conviction . . . .” *Id.* § 1B1.3(a)(2). Application Note 2 of section 2T1.1 states: “In determining the total tax loss attributable to the offense, all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated.” *Id.* § 2T1.1 cmt. n.2 (internal citation omitted).

29. See, e.g., William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 499 (1990). This article was written by authors intimately involved in conceptualizing and drafting the original Guidelines, which incorporated as a centerpiece the concept of relevant conduct. See *id.* at 495 nn.a–aa (discussing authors' credentials). I should note that prior to the introduction of the specific terminology in the Guidelines, the courts could consider what is now called relevant conduct in determining sentences. See DOJ CTM, *supra* note 9, § 43.04. Hence, the general concept was not new, but the Guidelines' adoption of the concept under the rubric of “relevant conduct” regularized its consideration in the sentencing process by addressing scope issues for relevant conduct and requiring that relevant conduct be considered in sentencing.

30. Conceivably, some portion or all of the third amount might be subject to the civil fraud penalty under the burden shifting rules in section 6663 if the trier of fact is in a state of equipoise as to whether this final unpaid portion is or is not attributable to fraud. See 26 U.S.C. § 6663 (2012). Resolutions of such cases by

bility (or deficiency), whereas only the first two are evaded taxes relevant to the criminal process.

This is a simplified example. As I will note later, there are other concepts that can cause the sentencing tax loss to vary from the tax evaded used in the guilt determination phase. The principal concept is the relevant conduct Guidelines concept that requires, or at least permits, the sentencing court to include in the base offense calculations criminal conduct for unconvicted crimes. In a criminal tax setting involving income taxes, the relevant conduct is the tax loss from similar evasive conduct in years other than the year(s) in the count(s) of conviction. I used a single year in the example above, but assume that the taxpayer had similar evasive conduct in three other years and tax loss in the same amount—\$200,000—for each of the years (the one convicted year and the three unconvicted years). The tax loss for those unconvicted years can be included in the tax loss computation regardless of whether (i) the defendant was acquitted of criminal conduct for the unconvicted years;<sup>31</sup> (ii) criminal conduct was charged for the unconvicted years but dismissed pursuant to the plea agreement; or (iii) criminal conduct was never charged for the unconvicted years for whatever reason, including expiration of the statute of limitations.<sup>32</sup> Hence, if the three other years involved the same type of conduct, the defendant's tax loss number would be \$800,000 rather than \$200,000. That makes for a significantly higher sentencing range under the Guidelines.<sup>33</sup> Relevant conduct tax losses to drive up sentencing are frequently encountered in tax cases.

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burden of proof equipoise are rare, so in most of the cases of the type described, the final \$100,000 will not be treated as tax evaded for criminal or civil purposes.

31. See *United States v. Watts*, 519 U.S. 148, 154 (1997) (holding there to be no violation of Double Jeopardy Clause). The Court in *Watts* based its holding on the notion that such 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 of conviction” and the lower standard of proof. *Id.* at 154–56. Note that in this regard, there is a similar civil tax analog which permits the Government to assert civil fraud even if the defendant has been acquitted of criminal evasion for the same period(s), a result justified by the lower standard of proof (generally as to fraud in a civil case, requiring clear and convincing evidence). See *Helvering v. Mitchell*, 303 U.S. 391, 397–98 (1938).

32. See DOJ CTM, *supra* note 9, § 43.04 (citing cases involving conduct beyond statute of limitations and other uncharged conduct).

33. The range thus calculated is limited by the maximum terms in the aggregate for the count(s) of conviction. For example, if the range calculated for the aggregate tax loss with all relevant conduct included were—when combined with other sentencing factors—to indicate a sentence exceeding the maximum terms for the counts of conviction, the sentence would be limited to the maximum for the count(s) of conviction. That maximum could then be subject to section 3553(a)/*Booker* downward variances, but not upward variances. See 18 U.S.C. § 3553(a) (2012); *United States v. Booker*, 543 U.S. 220, 222 (2005).

#### 4. *Restitution*

##### a. The Concept—Reimbursing the Victim for Financial Loss

Restitution is reimbursement to the victim for the financial loss related to the crime(s) the defendant committed.<sup>34</sup> For federal tax crimes, the victim is the public via the IRS.<sup>35</sup> Accordingly, restitution, when ordered in criminal tax cases, is made to the IRS. Unlike tax loss, which is the amount that was the object of the crime, restitution is reduced by payments up to the point that restitution is quantified in the restitution order, so that it is the remaining unpaid tax evaded at the time restitution is imposed.<sup>36</sup> In this regard, where it is possible for the defendant to pay all of the evaded tax prior to sentencing, it is to the defendant's benefit to do so because, in addition to reducing or eliminating restitution, it sets the right tone for the judge to give the defendant discretionary benefits in the sentencing process.

##### b. Statutory Mandatory and Permissive Restitution

Restitution may be imposed by the court pursuant to two overlapping provisions: 18 U.S.C. § 3663, the general restitution provision, and 18 U.S.C. § 3663A, the Mandatory Victim Restitution Act (MVRA).<sup>37</sup> These statutes require or permit restitution for tax related title 18 crimes (includ-

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34. See *United States v. Innarelli*, 524 F.3d 286, 293–94 (1st Cir. 2008) (“This is necessarily a backward-looking inquiry that takes into account what actually happened, including whether the victim managed to recover some or all of the value it originally lost.”). In sentencing, the court is required to consider “the need to provide restitution to any victims of the offense.” 18 U.S.C. § 3553(a)(7). “If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor.” *Id.* § 3553(c) (flush language). Finally, restitution is decided by the judge alone, because it is not punishment subject to the requirement that the jury determine the amount of restitution. See *United States v. Milkiewicz*, 470 F.3d 390, 403–04 (1st Cir. 2006); *United States v. Leahy*, 438 F.3d 328 (3d Cir. 2006); *United States v. May*, 413 F.3d 841, 849 (8th Cir. 2005).

35. See DOJ CTM, *supra* note 9, § 44.02[1] (citing cases).

36. There is a nuance. Even where the defendant has paid the victim of the crime (here the IRS), the court may order restitution and note that it has already been paid, meaning that, to the extent paid, there is no restitution remaining due as of the sentencing. I intend the concept here to mean the unpaid portion of the restitution ordered at sentencing.

37. See 18 U.S.C. § 3556 (referencing sections 3663A and 3663); see also *United States v. Amato*, 540 F.3d 153, 159 (2d Cir. 2008). Restitution, although intended to compensate the victim, does not make the victim a party to the sentencing proceeding in which restitution is imposed. The sentencing court may hear from the victim and will certainly consider the victim's claims. But, a victim not satisfied with the restitution order has no standing to appeal. See *United States v. Stoerr*, 695 F.3d 271, 276 (3d Cir. 2012).

ing the ubiquitous *Klein* defraud conspiracy).<sup>38</sup> Restitution, where authorized, takes priority over fines.<sup>39</sup>

Mandatory restitution is only permitted for losses from the count(s) of conviction and not for any conduct that may be considered as relevant conduct—criminal conduct outside the count(s) of conviction—in determining the tax loss which is the principal driver for the Guidelines sentencing range.<sup>40</sup> For example, assume that the defendant pleads as is typical in a tax case. The plea agreement provides: (i) the single count of conviction under the plea is a *Klein* conspiracy, a title 18 offense, for the years 2002–2006; (ii) the tax loss is \$100,000 in each year, for a total of \$500,000; and (iii) restitution is not addressed. In this example, the sentencing tax loss and the amount for restitution is the same, provided that the defendant has not paid any of the tax loss. The sentencing court can order restitution to the IRS for the tax loss in the years 2002–2006, aggregating \$500,000.<sup>41</sup> But, if in addition to the charged conspiracy, there was a different but similar uncharged *Klein* conspiracy covering the years 2000 and 2001, with \$100,000 tax loss in each of those years, the tax loss arising from that conspiracy could be included in the tax loss as relevant conduct for sentencing (thus increasing the tax loss to \$700,000) but could not be

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38. See DOJ CTM, *supra* note 9, § 44.02[2] (“Although the MVRA does not apply to criminal violations of Title 26, the MVRA does apply to criminal tax cases involving violations of Title 18, when the offenses are committed by fraud or deceit and are offenses against property, such as conspiracy to defraud the United States or to commit tax fraud, in violation of 18 U.S.C. § 371, or mail fraud, in violation of 18 U.S.C. § 1341.”). The *Klein* conspiracy is a term of art in criminal tax matters, referring to the defraud conspiracy under 18 U.S.C. § 371. The defraud conspiracy textually is a conspiracy “to defraud the United States, or any agency thereof in any manner or for any purpose . . .” 18 U.S.C. § 371. The defraud conspiracy in a tax setting is usually stated as a conspiracy to impair or impede the lawful functions of the IRS and, as articulated in *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), hence, in a tax setting, the defraud conspiracy is often referred to as a *Klein* conspiracy.

39. See 18 U.S.C. § 3572(b); see also U.S. SENTENCING GUIDELINES MANUAL § 5E1.1(c) (2013).

40. See *Hughey v. United States*, 495 U.S. 411, 413 (1990). Despite the post-*Hughey* enactment of the MVRA and subsequent amendments of the Victim and Witness Protection Act (VWPA), the holding of *Hughey* remains good law. See *United States v. Scheuneman*, 712 F.3d 372, 380–81 (7th Cir. 2013) (allowing restitution for multiple years within scope of section 7212(a) tax obstruction conviction because pattern of conduct subject to charge and conviction covered multiple years, so related to count of conviction and not relevant conduct); *United States v. Batson*, 608 F.3d 630, 637 (9th Cir. 2010); *United States v. Nolen*, 523 F.3d 331, 332 n.2 (5th Cir. 2008); *United States v. Maturin*, 488 F.3d 657, 660–61 (5th Cir. 2005); *United States v. Inman*, 411 F.3d 591, 595 (5th Cir. 2005) (citing *United States v. Mancillas*, 172 F.3d 341, 343 (5th Cir. 1999)) (noting that MVRA only permits “restitution for the conduct underlying the offense for which he was convicted”).

41. See *Scheuneman*, 712 F.3d at 380 (holding that restitution order could encompass losses “directly attributable” to section 7212 conviction, which unlike many tax crimes, but like conspiracy, can be course of conduct over many years, thus expanding scope of potential restitution); *Maturin*, 488 F.3d at 660–61.

included in restitution, because it is not within the scope of the offense of conviction. There are other possible differences between the tax loss and the amount of restitution, but you will note that both key off the evaded tax, with differences then created for other reasons.

Even if otherwise not covered by these statutory restitution provisions (title 26 crimes are not covered), the court is authorized by statute to impose restitution as a condition of some benefit to the defendant, such as probation or supervised release as opposed to incarceration.<sup>42</sup>

### c. Contractual Restitution

The sentencing court may order restitution to the extent provided in a plea agreement.<sup>43</sup> The Department of Justice Tax Division's (DOJ Tax) policy is generally to require contractual restitution in the plea agreement for the tax loss for both the pled counts and for counts that are dismissed pursuant to the plea.<sup>44</sup> Presumably, DOJ Tax might also require contractual restitution for relevant conduct, which includes uncharged tax crimes.<sup>45</sup>

## II. TAX LOSS

### A. A Simple Example to Illustrate the Key Role of Tax Loss

#### 1. Introduction

Consider this example, following the format for the Guidelines to illustrate how the Guidelines work in a tax setting: The taxpayer is convicted on one count of tax evasion for one year, the 2001 tax year, with the return being filed on April 15, 2002.<sup>46</sup> In that return, the taxpayer fraudulently omitted an item of income of \$250,000 from a legal source, resulting in a tax underpayment—tax evaded—of \$85,000. I assume that \$85,000 is the “criminal number” and, for present purposes, also the “tax

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42. See 18 U.S.C. § 3563(b)(2) (discussing restitution as condition of probation); *id.* § 3583(d) (referencing section 3563(b)(1)–(10)); see also *United States v. Perry*, 714 F.3d 570, 577 (8th Cir. 2013); *United States v. Hassebrock*, 663 F.3d 906, 923–24 (7th Cir. 2011); *Batson*, 608 F.3d at 635.

43. See 18 U.S.C. § 3663(a)(3).

44. See USAM, *supra* note 9, § 6-4.370; JOINT IRS/DOJ TASK FORCE ON RESTITUTION, MEMORANDUM RE STANDARD LANGUAGE FOR PLEAS AND ORDERS IN CRIMINAL TAX CASES INVOLVING RESTITUTION (2010) [hereinafter IRS/DOJ MEMO RE STANDARD LANGUAGE], available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title6/tax00018.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title6/tax00018.htm).

45. This would depend upon the parties' respective bargaining positions and often really turns upon limitations in resources allocable to determine tax loss attributable for other years. For example, IRS CI often does not investigate earlier years that could include relevant conduct simply because of a lack of resources and, perhaps, a feeling that the crime is adequately punished by the tax loss in the years investigated.

46. I choose this year in order to use the 2001 Sentencing Guidelines, which generally establish a higher Base Offense Level (BOL) for tax loss numbers than under the prior Guidelines.

loss,” which means that it is the tax on the components of income or deduction that results from evasion. The evasion was simple, garden-variety evasion, with no evasive or “sophisticated” measures to hide the omitted income or implement the evasion, such as using fictitious names, offshore accounts, and the like. The first step in the application of the Sentencing Guidelines is to determine the offense conduct and the Base Offense Level (BOL) that is determined by the offense conduct.<sup>47</sup>

## 2. *Applicable Offense Guideline*

Chapter 2 of the Guidelines is the starting point. Chapter 2 determines the offense conduct and lists the various federal offenses and statutory provisions. Tax crimes are addressed in part T of chapter 2. Tax crimes for this purpose may be divided analytically into two parts: (1) the crime itself and (2) the amount of tax that was the object of the crime (the tax loss).

The starting point is the BOL. Section 2T1.1 of the Sentencing Guidelines provides a BOL of six, unless the BOL under the graduate tax loss table in section 2T4.1 is higher.<sup>48</sup> I encourage readers to review the tax loss table in section 2T4.1 of the 2013 Sentencing Guidelines. In our example (\$85,000 of tax loss), the tax loss table provides a BOL of sixteen.<sup>49</sup>

We then go to the Specific Offense Characteristics in section 2T1.1(b) of the Sentencing Guidelines, which provides two level increases for illegal income for the tax loss and for “sophisticated means.”<sup>50</sup> The example we consider provides that the income is legal income and that no sophisticated means were involved.<sup>51</sup> Coming out of chapter 2 then, the offense level is sixteen (which is the BOL derived above). After this, the BOL is commonly called the offense level, which is subject to some adjustments.

## 3. *Adjustments*

Guidelines chapter 3 allows adjustments to the offense level. There are victim-related adjustments (upward, but not applicable in tax cases), role in the offense (leader, minimal participant) adjustments (upward or downward), obstruction of justice adjustments (upward), multiple counts

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47. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a)(1)–(2) (2013).

48. *Id.* § 2T1.1(a).

49. *Id.* § 2T4.1 (providing tax table).

50. *Id.* § 2T1.1(b)(2).

51. A straight-forward reading of the presentation in the Guidelines would suggest that the upward adjustment for sophisticated means is reserved for exceptional tax crimes cases. There has been some concern among practitioners that sophisticated means has become the rule and not the exception in tax cases. See Letter from Richard M. Lipton, Chair, ABA Section of Taxation, to Donald A. Purdy, Jr., Chief Deputy, Gen. Counsel, U.S. Sentencing Comm’n, Comments Concerning Proposed Amendments to the United States Sentencing Guidelines (Mar. 30, 2001), *reprinted in* 2001 TAX NOTES TODAY 68-67 (2001).

adjustments (upward in some cases), and acceptance of responsibility adjustments (downward). These are the types of matters judges considered before the Guidelines in determining appropriate sentences, but now they are formalized as steps in the Guidelines calculations.

The adjustment relevant in our example is a reduction for “acceptance of responsibility,”<sup>52</sup> which is most commonly achieved by entering a plea agreement. The reduction is at least two levels.<sup>53</sup> An additional one-level reduction is allowed if the level prior to the two-level reduction is sixteen or greater and the Government states that the defendant timely assisted by notifying the Government of intention to plead prior to preparation for trial.<sup>54</sup>

You are comfortable that your client has accepted responsibility and will qualify for this benefit if your client agrees to plead guilty. But, your client still wants to know what the sentencing range is before pleading. A plea qualifying for this adjustment would reduce the offense level by three.<sup>55</sup> Now your client is at offense level thirteen.

#### 4. *Criminal History or Livelihood*

Chapter 4 then provides for upward adjustments on the sentencing table for significant criminal history. In this case, as is common in tax prosecutions, the defendant has none, so we will move on, carrying forward the offense level of thirteen.

#### 5. *Application of the Sentencing Table*

The final Guidelines step is to apply the adjusted offense level, which is now thirteen, to the sentencing table contained in chapter 5, part A. The sentencing range is twelve to eighteen months.<sup>56</sup>

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52. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2013).

53. *Id.* § 3E1.1(a).

54. *Id.* § 3E1.1(b).

55. The better part of wisdom is to commit the prosecutors to the full three-level downward adjustment in the plea agreement. The sentencing judge does not have to accept that commitment, but it usually is persuasive to the judge.

56. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2013). These ranges do not take into account the good time credit that may be available to the actual sentence to require incarceration less than imposed by the judge. Section 3624(b) provides that, if the term is more than one year, the defendant may receive “up to 54 days at the end of each year of the prisoner’s term of imprisonment, beginning at the end of the first year of the term . . . .” 18 U.S.C. § 3624(b)(1) (2012). As interpreted, a prisoner will get about 12.88% per year for good time credit, meaning that the allowable number of days’ credit per year is forty-seven. For example, a sentence of one year requires time served of 365 days, while a sentence of one year and one day requires time served of 319 days. Practitioners and judges know this phenomenon; rarely is a sentence for one year given.

## 6. *The Final Sentence—18 U.S.C. § 3553(a)/Booker Discretion*

The foregoing completes the Guidelines calculations of a sentencing range. The Supreme Court's opinion in *United States v. Booker*<sup>57</sup> mandates that the Guidelines are advisory and are to be considered along with the other section 3553(a) factors in determining the final sentence.<sup>58</sup> The tax evaded will already be known to the judge because it is the key component of the Guidelines advisory calculations. So, the judge will undoubtedly consider the tax evaded in fashioning the final sentence under his *Booker* discretion.

## 7. *Summary—Key Role of the Tax Loss Number*

Returning to the Guidelines calculations, notice how key the starting point—the BOL—is to the process. In tax cases, the BOL is determined by the tax loss. In this example, the tax loss is \$85,000, which drives the BOL (prior to adjustments) to sixteen, and the sole adjustment is for acceptance of responsibility, driving the offense level to thirteen.

If you can drive the tax loss down \$5,000 to \$80,000, the process produces a sentencing range of ten to sixteen months.<sup>59</sup> Note correspondingly, however, that if the tax loss were \$200,000, you would still be in the same Guideline range and you would have a long way to reduce the tax loss to the next break point of \$80,000. But to turn that thought, the Government would only have a short way to go to ratchet your client into the next higher level, producing a sentencing range of eighteen to twenty-four months.

### B. *More on the Tax Loss*

#### 1. *General*

In the usual criminal prosecution, the initial investigation is conducted by IRS CI. The "criminal tax figure" and, if different, the tax loss<sup>60</sup> is initially calculated by the IRS based on its investigation and included in the Special Agent's Report (SAR) that is sent to DOJ Tax with the recommendation for prosecution or further grand jury investigation.<sup>61</sup> Where the investigation is a grand jury investigation, CI special agents will be assigned to assist the grand jury under Rule 6(e) and will prepare an SAR

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57. 543 U.S. 220 (2005).

58. *See id.* at 245; *see also* 18 U.S.C. § 3553(a).

59. The Base Offense Level is fourteen, but the adjustment for acceptance of responsibility is two, rather than three.

60. Remember that these figures could be different if relevant conduct brings in non-conviction years or tax evaded provable only by a preponderance of the evidence is included.

61. *See IRS, Special Agent Report (SAR), IRM 9.5.8.6* (Jan. 25, 2006), available at [http://www.irs.gov/irm/part9/irm\\_09-005-008.html#d0e291](http://www.irs.gov/irm/part9/irm_09-005-008.html#d0e291). Note that one of the required inclusions is "relevant conduct." *See id.* There will also be sentencing calculations.

when the grand jury investigation is complete.<sup>62</sup> In both instances, the CI special agent may be assisted by a civil agent.<sup>63</sup> At least when the IRS CI is involved, the defendant's<sup>64</sup> attorney may have some opportunity to have meaningful input in the criminal and tax loss calculations, both involving tax evaded numbers.

Also keep in mind that the practitioner will have opportunities to continue the process of reducing the tax evaded number as the case proceeds through the process (CI to DOJ Tax to United States Attorneys' Office (USAO)), but the key is to start the process as early as possible. It helps for the CI special agent to not include a higher loss in his calculations to start with because later players in the process may not be likely to reconsider that decision.

## 2. *Get the Criminal Tax Number as Low as Possible*

The criminal number is the evaded taxes provable beyond a reasonable doubt for the counts of prosecution. If the Government has to or does introduce in the case in chief a tax evaded figure, it should be the criminal number for the crimes having evaded taxes as an element. Early in the investigation, you should try to drive down that number. If that number comes down enough, the Government may decide not to prosecute. At a minimum, by driving the number down, the practitioner can positively affect any ultimate sentence that may be imposed.

Practitioners need a good investigative team, including a forensic tax accountant, to try to get the numbers down. One avenue to pursue is the opportunity offered by *James v. United States*<sup>65</sup> and its progeny, to exclude from the criminal equation tax items as to which the law does not offer sufficiently clear guidance that it can be the subject of criminal prosecution.<sup>66</sup> The willful element of most tax crimes requires "intentional viola-

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62. See USAM, *supra* note 9, § 6-4.125. This section, titled "IRS Transmittal of United States Attorney's Recommendation, Special Agent's and Criminal Tax Counsel's Reports, and Exhibits from Grand Jury Investigation," provides:

When a grand jury investigation is complete and the United States Attorney concludes that the Government has gathered sufficient evidence to proceed with prosecution, the United States Attorney should request that the special agent assigned to the matter prepare a SAR. After the SAR is completed, the special agent should request that CT Counsel review the SAR and prepare a CEM. Then, the SAC must forward the SAR, with copies of the relevant exhibits, and the CEM to the Tax Division for review and authorization.

*Id.*

63. Everyone from the IRS participating in any way in the grand jury investigation must be subject to the secrecy requirement of Rule 6(e) of the Federal Rules of Criminal Procedure. See FED. R. CRIM. P. 6(e)(2)(B).

64. At this stage, the taxpayer is not yet a defendant. I refer to the taxpayer as defendant only for consistency in the reference throughout the Article.

65. 366 U.S. 213 (1961).

66. See generally *id.*; see also *United States v. Dahlstrom*, 713 F.2d 1423, 1429 (9th Cir. 1983); *United States v. Garber*, 607 F.2d 92, 98-99 (5th Cir. 1979) (en banc); *United States v. Critzer*, 498 F.2d 1160, 1163 (4th Cir. 1974). The CTM

tion of a known legal duty.”<sup>67</sup> This means that, at an objective level, the duty must be knowable and, at a subjective level, the defendant must know of the knowable duty.

### 3. *Get the Tax Loss as Low as Possible*

The Guidelines provide that the calculation can include relevant conduct, such as the tax loss for years other than the years of conviction and tax loss resulting from conduct the defendant aided or abetted or conspired to commit.<sup>68</sup> Relevant conduct may be included in loss from (i) uncharged conduct (both state and federal taxes), (ii) charged conduct of which the defendant was acquitted, and (iii) conduct beyond the criminal statute of limitations.<sup>69</sup>

For example, assume that, through a common pattern, the taxpayer commits tax evasion for years one through six, evading \$100,000 in each year. The Government indicts him on April 14 of year nine, charging tax evasion (under section 7201) for all open years three to six (open years is a statute of limitations concept). The Government cannot indict for years one and two. Assume that the taxpayer pleads guilty to two counts of tax evasion for years five and six. The tax loss for purposes of setting the BOL is \$600,000. And, this result is not changed even if, for example, the jury determines guilt (rather than by plea) for the two years and then determines that, for the remaining years charged, the Government did not prove guilt beyond a reasonable doubt (i.e., the jury acquits the defendant).<sup>70</sup> What this means is that the defendant rides up the scale, gets a higher BOL, and a greater advisory sentencing range, as a result of conduct for which he was not convicted.

Indeed, this phenomenon can result in the BOL being the same in many plea situations where counts are dropped, as compared to going to trial and being convicted on all counts. In these situations, except for the acceptance of responsibility downward adjustment and possibly a section 5K1 substantial assistance adjustment, the defendant will get no benefit from the Government’s plea concession in dropping counts or not including counts in the first place.

Relevant conduct is negotiable because the relevance of the conduct outside the count(s) of conviction depends a lot upon perspective and bargaining dynamics. If the CI agents do not determine the relevant conduct during the investigation, for whatever reason (including lack of re-

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provides prosecutors with arguments to blunt what I call the *James* defense. See DOJ CTM, *supra* note 9, § 8.08[2] (“When the underlying tax law at issue in a case is vague or highly debatable, it may be difficult, if not impossible, to prove that a defendant acted willfully.”).

67. *Cheek v. United States*, 498 U.S. 192, 201 (1991).

68. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2013) (providing section titled “Relevant Conduct (Factors that Determine the Guideline Range)”).

69. See, e.g., *United States v. Maken*, 510 F.3d 654, 657–58 (6th Cir. 2007).

70. See *United States v. Watts*, 519 U.S. 148, 154 (1997).

sources), then the conduct would not be counted.<sup>71</sup> And, even if the CI agents do determine relevant conduct, perhaps the prosecutors can be talked into perceiving less relevance to the conduct or reducing the numbers in order to achieve a plea. But, it is important to make this attempt as early and often as possible, rather than leaving it for determination in a sentencing hearing. And, of course, the defendant should not in the process agree to a tax loss number that the defendant is not willing to live with.<sup>72</sup>

I share an anecdote. In one of the first criminal prosecutions I handled under the Guidelines, I was trying to convince the Assistant United States Attorney (AUSA) that the Government should not prosecute, by trying to create doubt as to willfulness. He listened politely but then said my arguments as to the client's lack of willfulness were unconvincing. He said I would be better off to "work the numbers hard." Our team did that. The numbers fell by over two-thirds from the original SAR, at least for purposes of reaching a plea agreement that the client would accept.<sup>73</sup> As a result, the client was given six months of home confinement, substantially lighter than the pre-*Booker*, virtually mandatory incarceration that would have been required if the sentencing court had adopted the special agent's original calculation of the tax loss.<sup>74</sup>

I mentioned in the anecdote that we reached an agreement as to the reduced tax loss in the plea agreement. Perhaps 90%, more or less, of tax crimes cases are resolved by plea agreement. The process of reaching the

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71. This omission of otherwise relevant conduct occurs often where the pattern of conduct persisted over a number of years. Say a taxpayer convicted of failure to file for four years that were open when indicted has not filed for the twenty preceding years. For resource and other reasons (perhaps not wanting to appear to be piling on or overpopulate the jails by longer sentences), the relevant conduct presented for sentencing may be from zero to perhaps two or three years, but not the entire twenty years for which determining the loss would require devotion of resources disproportionate to the criminal enforcement needs (the limited number of years will suffice). The same is true for a pattern of evasion for filed returns.

72. See *United States v. YooHo Weon*, 722 F.3d 583, 590 (4th Cir. 2013) (holding defendant to plea agreement tax loss of \$2,400,000, despite his later claim at sentencing that tax loss was really \$40,000 and rejecting argument that, even if stipulated amount is binding for sentencing, lower tax loss amount can be considered under section 3553(a) and *Booker*); see also Jack Townsend, *Fourth Circuit Holds Defendant to His Tax Loss Stipulated in the Plea Agreement*, FED. TAX CRIMES BLOG (July 24, 2013, 1:50 PM), <http://federaltaxcrimes.blogspot.com/2013/07/fourth-circuit-holds-defendant-to-his.html>.

73. All of the numbers were good civil tax numbers (tax deficiency). Where we succeeded was in moving the key two-thirds from the tax evaded category because we convinced the AUSA that he would not be able to prove that the taxpayer intended evasion and the components of the two-thirds so moved.

74. Now, if we could have lopped off, say one-half of the remaining one-third of the tax loss, perhaps we could have convinced the Government that there was not enough tax evaded to pursue the criminal case at all. But, we just could not get there. This was pre-*Booker*; I suspect that, with *Booker*, we would have gotten a sentencing equivalent of this benefit.

agreement is the last time in most tax cases to really work the numbers. Without getting into the details of the dynamics of the plea process, suffice it to say that prosecutors have systemic pressures to resolve cases by plea. Pleas are deals; in the deal metaphor, there must be a willing buyer and a willing seller. The plea has to be sweet enough that the defendant will agree, and one way to sweeten the pot is to get the tax loss sufficiently low so that the taxpayer's Guidelines range is as low as possible. This dynamic may assist the AUSA in a revelation that, well, some material component item(s) of income, deduction, or credit in the prior calculations of the tax loss number, involve civil issues rather than criminal.<sup>75</sup> There may be other items considered in the plea negotiations as to which the AUSA can have properly guided revelations favorable to the defendant, but the tax loss is the most obvious.

#### 4. *Presumptions, Extrapolations, and Guesses in Computing Tax Loss*

##### a. Presumptions

The Guidelines require certain presumptions as to the amount of the tax loss “unless a more accurate determination of the tax loss can be made.”<sup>76</sup> To illustrate, in the case of an individual filing a fraudulent return, those presumptions are: 28% of unreported income or improperly claimed deductions, *plus* the full amount of false tax credits.<sup>77</sup>

In the case of individual failure to file, the tax loss is “the amount of tax that the taxpayer owed and did not pay.”<sup>78</sup> In making the tax loss calculation, in the absence of “a more accurate determination,” the pre-

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75. In this process, the risk is that (i) the probation officer in the Pre-sentence Report (PSR) may recommend higher numbers than agreed in the plea agreement or that (ii) the sentencing judge may do so *sua sponte*. These are risks that, for a number of reasons, virtually never become a reality. I do note in the text below an example where the sentencing judge did intervene on the tax loss stipulated in the plea agreement and recommended by the probation officer, but when you read the example you will realize that it was a situation where the sentencing court easily determined that, if the tax loss definition said that, that definition was an ass. See CHARLES DICKENS, *OLIVER TWIST* 204 (1839) (noting famously that “the law is an ass”). The court did not have to follow the aberrant conclusion to the lowest sentence possible. Rather, the court could fix it by a different interpretation of tax loss or, if necessary, by the discretion to vary upward under section 3553(a) and *Booker*. See 18 U.S.C. § 3553(a) (2012); *United States v. Booker*, 543 U.S. 220, 222 (2005).

76. U.S. SENTENCING GUIDELINES MANUAL § 2T1.1(c)(1)(A)–(C) (2013); see also *id.* § 2T1.1 cmt. n.1 (“In these situations, the ‘presumptions’ set forth are to be used unless the government or defense provides sufficient information for a more accurate assessment of the tax loss.”).

77. *Id.* § 2T1.1(c)(1)(A)–(C).

78. *Id.* § 2T1.1(c)(2). I discuss a case later in this Article where this definition was critical to permit a taxpayer, who was at the center of a failure to pay over withheld taxes, to claim the credit and thus reduce tax due for withheld taxes not actually paid over.

sumption is: 20% of the gross income, *less* tax withheld or otherwise paid.<sup>79</sup>

The calculation of the net tax due (tax less payments) is the criminal figure concept, which excludes anything that the taxpayer could not have had an intent to evade (i.e., it is not the unpaid civil tax liability/deficiency). There may be an opportunity to lower the tax loss in some cases by arguing that the taxpayer had no intent to evade as to some or all of the tax loss the Government seeks to apply. To illustrate, I gave the example above where there were two components of omitted income—embezzlement income, clearly taxable, and personal injury income, not sufficiently certain of taxation that it should be included. In the case of fraudulent return evasion, the latter component would be excluded from the evaded tax calculation. Now apply that to a failure to file a return where those two items were the only components of gross income and the 20% presumption would apply. You could assert that the 20% should only apply to that component of income—embezzlement income—that was sufficiently certain of taxation under the same standard. In other words, it is not the tax deficiency, but the lower tax evaded amount.<sup>80</sup>

The Government, of course, has the burden to establish the tax loss at sentencing, but these presumptions may kick in to meet that burden if the taxpayer fails to produce a more accurate calculation.<sup>81</sup> Keep in mind, however, that as noted above, the percentage assumptions apply to the items that meet the historic definition of criminal conduct—evaded tax—and thus should not apply to those items historically excluded in determining the criminal figure. The discussion immediately above related to failure to file is instructive, because it is also applicable in other contexts. Moreover, in some cases, the Government will want to present the more accurate determination to generate a higher tax loss than the presumption might generate.

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79. U.S. SENTENCING GUIDELINES MANUAL § 2T1.1(c)(2)(A).

80. I made this genre of argument in an early case involving a failure to file syndrome defense to a section 7203 charge where the taxpayer's income was reported on W-2s and 1099s, thus assuring that the IRS would know of the income and, eventually, it would be resolved. At least, that was my story and I stuck to it. In effect, as to any unpaid tax, the taxpayer was just deferring but not evading his tax liability, and the tax loss concept goes to evasion and not to deferring. One of the arguments I made to the AUSA was that, on this basis, even if the Government got a conviction, it may end up getting no incarceration because the tax loss might be zero. The potential for incarceration is an important factor in determining whether the Government should indict. Whether for that reason or some other (that I did not know about), the AUSA returned the case to DOJ Tax without indictment.

81. *See generally* United States v. Sullivan, 255 F.3d 1256 (10th Cir. 2001) (illustrating example of reliance on presumption involving earlier Guideline where presumption was 20%).

b. Extrapolations and Guesses

The Government may attempt to use extrapolations that it thinks are persuasive to a court in determining a reasonable tax loss for sentencing. This often occurs, for example, in a prosecution of tax preparers who have prepared many fraudulent returns. The Government may audit only a small portion of the returns prepared by the preparer but will then attempt statistical extrapolation for a sentencing tax loss larger than the sampled returns. The use of such extrapolations has been addressed only infrequently by the courts, but the logical rule that has developed is that, if persuasive, this type of evidence can be used.<sup>82</sup> By contrast, guesses that do not have a firm basis in logic and reasonableness will not be accepted.<sup>83</sup>

5. *Unclaimed Deductions and Credits*

Courts have divided over whether a defendant's tax loss can account for unclaimed deductions (i.e., deductions that the defendant did not claim on the return the taxpayer filed or deductions that were never claimed because the defendant did not file a return). The issue turns upon the respective courts' interpretations of the general definition of tax loss—the tax that was the object of the defendant's criminal tax offense. I will not get into the interpretations that split the courts over the years, because the Sentencing Guidelines have recently been revised, effective November 1, 2013, to provide the courts uniform guidance on the issue.<sup>84</sup>

The interpretation, effective November 1, 2013, is reflected in Application Note 1. The amendment to the Application Note is:

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82. See, e.g., *United States v. Ahanmisi*, 324 F. App'x 258, 260 (4th Cir. 2009) (involving tax preparer sentencing in which, at Government's request, tax loss was projection to total universe of returns prepared from sample of returns). The Court of Appeals reversed on the ground that the sample was not random and thus could not be the basis for an inference that it represented the universe. See *id.* In another case, the Fourth Circuit later sustained a sentencing court's extrapolation. See *United States v. Mehta*, 594 F.3d 277, 283–84 (4th Cir. 2010). Even though the sampling was not random (a baseline requirement for statistically valid extrapolations to the universe), the error was harmless because the tax loss determined by the sentencing court was reasonable under the facts. See *id.* The Fourth Circuit distinguished *Mehta* from *Ahanmisi* by stating that, unlike in *Mehta*, the sentencing court in *Ahanmisi* was unable to compensate for the skewed sample. See *id.* at 283–84; see also *id.* at 284–85 (Shedd, J., concurring); *United States v. Simmons*, 420 F. App'x 414, 418 (5th Cir. 2011) (focusing on reasonableness of extrapolations).

83. See *Ahanmisi*, 324 F. App'x at 260.

84. Any readers interested in the pre-amendment split among the circuits can consult various sources, including prior editions of my book, available on SSRN, for discussion of this issue. See John A. Townsend, *Federal Tax Crimes* (Working Paper, 2013), available at <http://ssrn.com/abstract=2212771>. Also, I have discussed the issue in my Federal Tax Crimes Blog, in posts published prior to the date of the Amendment. See generally Jack Townsend, FED. TAX CRIMES BLOG, <http://federaltaxcrimes.blogspot.com>.

3. Unclaimed Credits, Deductions, and Exemptions.—In determining the tax loss, the court should account for the standard deduction and personal and dependent exemptions to which the defendant was entitled. In addition, the court should account for any unclaimed credit, deduction, or exemption that is needed to ensure a reasonable estimate of the tax loss, but only to the extent that (A) the credit, deduction, or exemption was related to the tax offense and could have been claimed at the time the tax offense was committed; (B) the credit, deduction, or exemption is reasonably and practicably ascertainable; and (C) the defendant presents information to support the credit, deduction, or exemption sufficiently in advance of sentencing to provide an adequate opportunity to evaluate whether it has sufficient indicia of reliability to support its probable accuracy.

However, the court shall not account for payments to third parties made in a manner that encouraged or facilitated a separate violation of law (e.g., “under the table” payments to employees or expenses incurred to obstruct justice).

The burden is on the defendant to establish any such credit, deduction, or exemption by a preponderance of the evidence.<sup>85</sup>

The Commission’s reasons for the amendment (the legislative history, if you will):

This amendment reflects the Commission’s view that consideration of legitimate unclaimed credits, deductions, or exemptions, subject to certain limitations and exclusions, is most consistent with existing provisions regarding the calculation of tax loss in § 2T1.1.

The new application note first provides that courts should always account for the standard deduction and personal and dependent exemptions to which the defendant was entitled. The Commission received public comment and testimony that such deductions and exemptions are commonly considered and accepted by the government during the course of its investigation and during the course of plea negotiations. Consistent with this standard practice, the Commission determined that accounting for these generally undisputed and readily verifiable deductions and exemptions where they are not previously claimed (most commonly where the offense involves a failure to file a tax return) is appropriate.

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85. U.S. SENTENCING COMM’N, *Amendments to the Sentencing Guidelines* (Apr. 30, 2013), [http://www.ussc.gov/Legal/Amendments/Reader-Friendly/20130430\\_RF\\_Amendments.pdf](http://www.ussc.gov/Legal/Amendments/Reader-Friendly/20130430_RF_Amendments.pdf) [hereinafter *Amendments to Sentencing Guidelines*] (citations omitted) (compiling unofficial text of amendments); see also U.S. SENTENCING GUIDELINES MANUAL § 2T1.1 cmt. n.1 (2013).

The new application note further provides that courts should also account for any other previously unclaimed credit, deduction, or exemption that is needed to ensure a reasonable estimate of the tax loss, but only to the extent certain conditions are met. First, the credit, deduction, or exemption must be one that was related to the tax offense and could have been claimed at the time the tax offense was committed. This condition reflects the Commission's determination that a defendant should not be permitted to invoke unforeseen or after-the-fact changes or characterizations—such as offsetting losses that occur before or after the relevant tax year or substituting a more advantageous depreciation method or filing status—to lower the tax loss. To permit a defendant to optimize his return in this manner would unjustly reward defendants, and could require unjustifiable speculation and complexity at the sentencing hearing.

Second, the otherwise unclaimed credit, deduction, or exemption must be reasonably and practicably ascertainable. Consistent with the instruction in Application Note 1, this condition reaffirms the Commission's position that sentencing courts need only make a reasonable estimate of tax loss. In this regard, the Commission recognized that consideration of some unclaimed credits, deductions, or exemptions could require sentencing courts to make unnecessarily complex tax determinations, and therefore concluded that limiting consideration of unclaimed credits, deductions, or exemptions to those that are reasonably and practicably ascertainable is appropriate.

Third, the defendant must present information to support the credit, deduction, or exemption sufficiently in advance of sentencing to provide an adequate opportunity to evaluate whether it has sufficient indicia of reliability to support its probable accuracy. Consistent with the principles set forth in § 6A1.3 . . . this condition ensures that the parties have an adequate opportunity to present information relevant to the court's consideration of any unclaimed credits, deductions, or exemptions raised at sentencing.

In addition, the new application note provides that certain categories of credits, deductions, or exemptions shall not be considered by the court in any case. In particular, "the court shall not account for payments to third parties made in a manner that encouraged or facilitated a separate violation of law (e.g., 'under the table' payments to employees or expenses incurred to obstruct justice)." The Commission determined that payments made in this manner result in additional harm to the tax system and the legal system as a whole. Therefore, to use them to reduce the tax loss would unjustifiably benefit the defendant and

would result in a tax loss figure that understates the seriousness of the offense and the culpability of the defendant.

Finally, the application note makes clear that the burden is on the defendant to establish any credit, deduction, or exemption permitted under this new application note by a preponderance of the evidence, which is also consistent with the commentary in § 6A1.3.<sup>86</sup>

I am not sure that, given the opening paragraph, the Commission makes a compelling case for excluding unclaimed deductions or credits that are not related to the criminal offense. Can or should it be that the measure of punishment is not based on the real tax number rather than a notional one calculated by ignoring unclaimed deductions? I think that depends upon one's concept of fairness and the goal of making the punishment fit the crime. And, of course, to the extent that unrelated deductions might materially reduce or eliminate the real tax deficiency, I think the court could have *Booker* discretion to make some adjustment in the final sentence.

One thing to consider early in the process is whether to file an amended return claiming the previously unclaimed, unrelated deductions. In order to do that, of course, the taxpayer will effectively admit the omitted income or overstated deductions and credits that generated the IRS's interest in the first place. But, if the unclaimed deductions or credits are large enough, it may thwart either a civil agent referral to CI or a CI referral to DOJ Tax. These types of strategies must be planned by experienced attorneys aware of all the risks they entail.

## 6. *Corporate Diversions to Shareholders*

### a. The Unclaimed Compensation Deduction Issue

In situations where the taxpayer cheats on taxes through a closely held "C Corporation," there will be the double level tax loss to consider. For example, if a taxpayer diverts gross income from the corporation to himself without reporting the income by either of them, the corporation will have evaded tax and the taxpayer will also have evaded tax. Both levels of unpaid tax can be included in the tax loss for the shareholder as defendant. A frequent gambit in order to avoid including the corporate level tax in the tax loss is to urge that the constructive payment from the corporation to the shareholder was really additional deductible compensation, entitling the corporation to a deduction, thus producing no corporate level tax loss. The courts generally reject that argument, for the corporation did not in fact pay the amount as salary.<sup>87</sup> And, even if that hurdle is

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86. *Amendments to Sentencing Guidelines*, *supra* note 85, cmt. (explaining reason for amendment).

87. *See, e.g.*, *United States v. Gordon*, 291 F.3d 181, 187 (2d Cir. 2002); *United States v. Martinez-Rios*, 143 F.3d 662, 671 (2d Cir. 1998).

cleared, the use of the deduction to lower the tax loss will have to pass muster under the new unclaimed deductions rule. It probably would where, as posited, the defendant's shareholder level tax is alleged as evaded tax.

b. The Dividend Issue

Treating the transaction as a constructive receipt by the corporation and distribution to the shareholder is pretty much a no-brainer from a civil tax perspective. However, complexity may lie in how the distribution is taxed to the shareholder. Under the Code, a corporate distribution is taxed to the shareholder as a dividend only to the extent of the corporation's cumulative or current earnings (E&P). The balance of the distribution, if any, is taxed either as a nontaxable return of capital to the extent of basis in the stock, or a capital gain to the extent of the excess of the distribution over basis.<sup>88</sup> These determinations require that E&P be calculated. Therein lies the potential problem/opportunity.

Without getting into the complexities of determining E&P, suffice it to say here that E&P can be very difficult to calculate.<sup>89</sup> Since the November 2001 Guidelines, the difficulties inherent in E&P are resolved by permitting presumptions to apply (34% of diverted amount at corporate level and 28% at individual level).<sup>90</sup> In the tax loss calculations, the amount of the corporate diversion is taxed to the corporation *and* in full to the diverting shareholder without reduction for the corporate tax and without any other E&P calculations.

The really troubling point is that the presumption can create a tax loss for sentencing purposes where proper analysis of E&P could show that, in fact, there was no tax evaded at the shareholder level. Indeed, in the restitution calculation or the civil case usually following after conviction, it may well be that the taxpayer can establish for civil tax purposes (where the truth,<sup>91</sup> and not presumptions, control) that there is no dividend and no shareholder level tax.<sup>92</sup> Should our criminal tax system require that sentencing be driven by presumptions inconsistent with the truth (or more precisely, without regard to truth)?

Finally, there may still be some play in the E&P issue at the guilt determination phase. Remember that in a tax evasion case the Government must prove tax evaded beyond a reasonable doubt. What if a foray into the murky swamp of E&P could show that there is really no shareholder level tax or, if there were such a tax, it was not material or it is too murky

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88. See 26 U.S.C. §§ 301, 316 (2012).

89. See, e.g., BORIS I. BITTKER & JAMES S. EUSTICE, *FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS*, ch. 8 (7th ed. 2000).

90. U.S. SENTENCING GUIDELINES MANUAL § 2T1.1 cmt. n.7 (2013).

91. At least the truth based on the evidence presented.

92. I note below that there may be a problem if the tax loss gross of the deductions were included in the restitution amount, but presumably restitution is not subject to the potential denial of reduction for unclaimed deductions.

to know beyond a reasonable doubt? There is no such presumption that the Government can rely upon in the guilt determination phase.<sup>93</sup>

### 7. *Timing Issues*

On the original return, a taxpayer may have improperly claimed a tax benefit (deduction or credit) that he is entitled to in a later year. This is sometimes referred to as a timing difference. The issue is how the tax loss in the improper earlier year is to be calculated and, specifically, whether the amount of the tax loss is adjusted downward in that year to account for the fact that the taxpayer may have not claimed the deduction in the later proper year. To take an extreme case, assume that a defendant improperly claimed a \$1,000 deduction in year one that he is entitled to take in year two but does not claim in year two. Assume further that the tax saved by claiming the deduction, focusing only on year one, is \$250 (actual) or \$280 (presumptive). But, is that the real loss to the Government because the Government will make that up in year two when the taxpayer does not claim the deduction?<sup>94</sup> In the bare facts given, what is the real tax loss? It is not \$250 (actual) or \$280 (presumptive), but rather (assuming constant or materially the same marginal rates), it is zero, except for, perhaps, the time value of money for that short one-year timing period. Normally, except in collection evasion cases, the time value of money is not considered in calculating the tax loss.

In the only opinion to address the issue, *United States v. Stadtmauer*,<sup>95</sup> the timing issue was in the context of depreciation where a current deduction was claimed for items that could be depreciated over future years.<sup>96</sup> The Government wanted to apply the 28% presumptive rate to the entire deduction claimed without any mitigation for the future tax revenue the Government did or would collect.<sup>97</sup> The defendant cried foul and the court listened. The court opined:

Mr. Stadtmauer argues that since the issue is only one of timing there is no tax loss associated with these deductions. The Government disagrees, arguing that there is at [ ] least a loss due to the time value of money. However, the Government does not argue that the loss is the time value of money, rather the Govern-

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93. See *United States v. Bok*, 156 F.3d 157, 163–64 (2d Cir. 1998). The defendant will likely have to put the issue in play by meeting some type of production burden. See *id.*

94. Note that there is a real sweet civil mitigation issue that could be addressed here if the defendant were to attempt to deduct the same item in year two, but let us not get bogged down in noncriminal matters here because I assume that the defendant did not claim the deduction in year two. The civil mitigation rules are found in 26 U.S.C. §§ 1311–1314 (2012).

95. No. 05-249, 2009 WL 361113 (D.N.J. Feb. 9, 2009), *aff'd*, 620 F.3d 238 (3d Cir. 2010).

96. See *generally id.*

97. See *id.* at \*12.

ment argues that because there is some loss due to the time value of money the 28% presumptive rate should be used. This Court agrees with the Government that the time value of money should be considered as a tax loss, but disagrees that using the 28% rate is appropriate; the 28% rate does not “fit the circumstances” for these deductions.

The Court recognizes, and the Government conceded at the sentencing hearing, that as a general matter, tax loss under the Guidelines for the crimes at issue here does not include interest and penalties. The Court also recognizes that interest calculations are meant to account for the time value of money, so arguably any interest based calculation should not be included under the Guidelines. But, the Court also finds that recognizing a time value of money effect for these deductions is completely different than the general case of calculating and adding interest, as addressed in Application Note 1. Under § 2T1.1(c), “the tax loss is the amount of loss that was the object of the offense.” Here, the purpose of taking the deductions in full in the year incurred was to receive the time value of money benefit from paying less taxes now rather than spread over time; it was not merely some ancillary benefit to the primary object of avoiding taxes by taking a deduction that was not permissible at all, the time value of money benefit was *the object* of the offense.

The question, then, is what is a reasonable way to estimate this loss. As noted above, to accept the presumptive 28% rate as the Government argues would be unfair and drastically overstate the tax loss. The Court finds that the most reasonable way to account for this loss is by using the Government’s own method for compensating itself for the time value of money related to underpayments of tax. Interest on underpayments is calculated by the IRS pursuant to 26 U.S.C. § 6621(a)(2). This rate is determined quarterly. For the years 1997 to 2001, the IRS rate for non-corporate underpayments varied between 7% and 9%, with the rate declining in the years after 2001. This Court finds that using a rate of 8%, a rate in the middle of the range, is reasonable. This approach is not perfect. It does not account for compounding, but it also does not account for the exact timing of the deductions. However, exact precision is not required. This Court finds that the other methods suggested either understate or overstate the intended loss and that this method is the most fair and reasonable estimate of the loss intended for these items.<sup>98</sup>

This is a creative solution to the problem.

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98. *Id.* at \*15–16 (citations omitted).

8. *Tax Loss Numbers from Others' Conduct (Related or Joint Criminal Activity)*

a. General

The concept of relevant conduct includes criminally related harm attributable to the conduct of others with whom the defendant had a relationship of the type that would normally make the defendant criminally liable for crimes committed by another.<sup>99</sup> The first type of relevant conduct is defined as “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . .”<sup>100</sup> We have already considered the “committed” concept whereby tax loss can include conduct of a defendant for non-conviction years. The remainder of the quoted conduct describes standard criminal concepts of aiding, abetting, and causing incorporated in 18 U.S.C. § 2, which make a defendant criminally liable even if the defendant is not otherwise guilty of the crime.<sup>101</sup>

The second type of relevant conduct includes: “[I]n the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity . . . .”<sup>102</sup>

This second type is technically, as worded, related to the concept of conspiracy but is actually drawn more narrowly than the criminal concept of conspiracy. However, subject to the caveat that it may not always be the same, it probably is substantially coterminous in most cases.<sup>103</sup>

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99. The consideration of relevant conduct is consistent with section 3661, which provides: “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 (2012).

100. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(A) (2013).

101. See John A. Townsend, *Theories of Criminal Liability for Tax Evasion* (2012), available at <http://ssrn.com/abstract=2060496>.

102. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(B). There is some conceptual overlap between at least some type of conduct that could be viewed as aiding and abetting and conduct that is viewed as within the scope of a conspiracy. I do not think there is any practical significance to such nuance in the context of this discussion.

103. For those wanting the nuance on this, obviously the starting point is the language of the Guideline itself. Then, the Guideline provides useful examples. See *id.* § 1B1.3(a)(1)(B); *id.* § 1B1.3 cmt. 2 (discussing concepts in some detail). The CTM also discusses the concepts. See DOJ CTM, *supra* note 9, § 43.04. In a Simplification Draft Paper for discussion purposes, the U.S. Sentencing Commission wrote the following as the view of the training staff about this provision:

[B]ecause the Commission defined sentencing liability for conspiracies more narrowly than traditional criminal law conspiratorial liability and because the Commission's definition of sentencing liability for conspiracies is intricate and fact specific, the training staff believes that applying this definition has been a struggle for attorneys, probation officers, and

In each of these cases, some additional nexus to the tax loss harm is required,<sup>104</sup> but for purposes of this outline, these nuances are not material. Suffice it to say that tax loss within the scope of a tax conspiracy—that is reasonably foreseeable—will be included as relevant conduct. A good rule of thumb is that the reasonably foreseeable tax loss from the time the defendant joins the conspiracy until the defendant effectively withdraws from the conspiracy will be included.<sup>105</sup>

For example, if an object of the conspiracy is to have the participants not report their illegal income, all conspirators' tax loss numbers will be relevant conduct.<sup>106</sup> Similarly, if the conspiracy is to promote illegal tax shelters, the tax loss numbers for the taxpayers—whether active participants in the conspiracy or not—will be included.

Even if the defendant in question is not indicted for conspiracy, the tax loss from “jointly undertaken criminal activity” can be included if proved by a preponderance of the evidence.<sup>107</sup> Such activity will usually

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courts since the advent of the guidelines. Specifically, unlike criminal conspiratorial liability, relevant conduct limits sentencing conspiratorial liability to “jointly undertaken criminal activity.” This prong of relevant conduct often requires courts to hold significant hearings to determine what part of a defendant’s criminal law conspiratorial liability “the particular defendant agreed to jointly undertake (*i.e.*, the scope of the specific conduct and objectives embraced by the defendant’s agreement)” as well as all reasonably foreseeable conduct of others in furtherance of the jointly undertaken activity. [U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 cmt. n.2 (2013).] Because this determination is case- and fact-specific, and because the determination can drive a guideline sentence, it is litigated in many cases. Commission research shows that after the drug guideline, relevant conduct is the most frequently appealed guideline issue. These data further show that most of the appeals surround the definition of conspiratorial liability.

U.S. SENTENCING COMM’N, RELEVANT CONDUCT AND REAL OFFENSE SENTENCING (simplification draft paper), *available at* [http://www.ussc.gov/Research/Working\\_Group\\_Reports/Simplification/RELEVANT.HTM](http://www.ussc.gov/Research/Working_Group_Reports/Simplification/RELEVANT.HTM) (last visited June 1, 2014).

104. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(2) (2013). The Guidelines require that the relevant conduct be “part of the same course of conduct or common scheme or plan as the offense of conviction” and that it be groupable, under section 3D1.2, with the counts of conviction had the defendant been convicted of the relevant conduct. *Id.* § 1B1.3(a)(2); *see also id.* § 1B1.3 cmt. n.8.

105. *See id.* § 1B1.3 cmt. n.2 (last paragraph); *see also* Grunewald v. United States, 353 U.S. 391, 401–02 (1957) (addressing scope of conspiracy, specifically as to whether subsequent acts after main object of conspiracy are within scope of conspiracy).

106. *See, e.g.*, United States v. Gricco, 277 F.3d 339, 356–58 (3d Cir. 2002).

107. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 cmt. n.2 (2013). As to the general proposition that sentencing factors need to be proved only by a preponderance of the evidence, the CTM cautions, “the Supreme Court has specifically left open the question 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.” DOJ CTM, *supra* note 9, § 43.04 (quoting United States v. Watts, 519 U.S. 148, 156–57 n.2 (1997)).

fit the definition of a conspiracy<sup>108</sup> and, as a result, the Government will usually indict for conspiracy<sup>109</sup> and, in tax cases, will usually require a plea to the conspiracy count in a plea agreement.

So, generally, there is a huge potential downside to being convicted of tax conspiracy. In this regard, in the major tax shelter prosecutions, the prosecutors were quick to point out to persons within the potential scope of the criminal investigations (referred to as subjects, but also including targets) that the intended losses from the conspiracy were in the billions—meaning, at least in terms of sentencing, the Guidelines range calculation was to be as high as it gets. And, when the prosecutors first started this mantra, the Guidelines were considered binding rather than just advisory as a result of *Booker*. Judges could still depart, and no one representing criminal defendants really believed that a judge would sentence based on those Guideline ranges without a departure to achieve better justice. Still, it was a risk that could not be ignored. So, as to how one of these defendants attempted to mitigate the risk, see the next section of this Article.

#### b. Is There a Tax Loss Benefit to a Conspiracy Conviction?

I illustrate here a possible benefit with the right plea in tax cases. I noted above that conspiracy charges are often encountered in tax cases and in federal criminal cases generally. And, in the plea process, the conspiracy charge is often considered the major count under DOJ Tax's major count policy.<sup>110</sup> Under that policy, a defendant may be offered a single plea, frequently the conspiracy plea, with dismissal of the substantive counts. The tax conspiracy Guideline is section 2T1.9, which establishes a BOL of ten or, if higher, the BOL from the regular tax Guideline in section 2T1.1 under the tax loss table. But, if the count of conviction is solely for the tax conspiracy and not for any substantive tax crime (such as evasion), section 2T1.1 may have no application because of the definition of tax loss in section 2T1.1.

This counterintuitive opportunity played out in *United States v. Coplan*,<sup>111</sup> involving a major prosecution of several defendants for Son-of-Boss fraudulent tax shelters.<sup>112</sup> The sentencing court found that the conspiracy intended \$400 million in tax loss from the taxpayers to whom the conspirators sold the shelters. However, apparently because the defen-

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108. For this purpose, there is no practical distinction between the offense conspiracy and the *Klein* defraud conspiracy. In both cases, it is the tax loss that is the object of the conspiracy—in conspiracy lingo, within the scope of the conspiracy—that is included.

109. See *United States v. Reynolds*, 919 F.2d 435, 439 (7th Cir. 1990). Judge Easterbrook lamented in a tax case (but for federal criminal charges generally), that the federal conspiracy charge is “inevitable because prosecutors seem to have conspiracy on their word processors as Count I; rare is the case omitting such a charge.” *Id.*

110. See DOJ CTM, *supra* note 9, § 5.01[1]; USAM, *supra* note 9, § 6-4.310.

111. 703 F.3d 46 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 71 (2013).

112. See *id.* at 92–94.

dant in question, Bolton, pled only to the conspiracy count, the prosecutors stipulated in the plea agreement that there was no tax loss and the probation office's PSR also concluded that there was no loss. That conclusion was based on a literal interpretation of tax loss in section 2T1.1(c)(1) of the Guidelines, which defines tax loss as follows: "If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed)."<sup>113</sup>

The offense referred to is the offense of conviction. The offense of conviction was conspiracy and, hence, not included in the definition of tax loss, even though that tax loss was the object of the conspiracy. Not liking that result because the indicated Guidelines range understated the gravity of the defendant's conduct, the prosecutors asked the court to impose a section 3553(a)/Booker upward variance. The sentencing court also did not like the result and did not interpret the term "tax loss" so narrowly as to preclude its application simply because the count of conviction was conspiracy rather than a substantive tax crime. The tax loss within the scope of the conspiracy was \$400 million, thus making the BOL substantial, under the tax tables in sections 2T1.1 and 2T1.4, with a resulting Guidelines range (after all adjustments) of 210–260 months. The sentencing court then made a 93% Booker downward variance to fifteen months, under section 3553(a), saying that the court would have imposed the same sentence had there been no "tax loss." The Second Circuit held that the sentencing court had properly included the tax loss in the Guidelines calculations, but that the sentencing court's statement that the same sentence would have applied without a tax loss made any error "harmless."<sup>114</sup>

So, is this "benefit" of the conspiracy plea available or not? I do not know. It does not sound right, which, of course, is what grabbed the sentencing judge's attention (and, I think, the appeals judges' attention). On the other hand, I do not think the prosecutors would have stipulated to it or the probation office would have agreed if there were not a strong basis for it.<sup>115</sup> Defendants attempting to exploit this opportunity must also be prepared for a similar response from the prosecutors (grudging acceptance with a request for upward variance) and from sentencing courts (a stiffer sentence based on interpretation or Booker variance).<sup>116</sup>

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113. *Id.* at 94 (emphasis added) (quoting U.S. SENTENCING GUIDELINES MANUAL § 2T1.1(c)(1) (2013)).

114. *Id.* at 92–94.

115. I throw out one consideration for those wanting to exploit the opportunity. It seems to me that the argument is better if the count of conviction is solely for the *Klein* defraud conspiracy and is not for the offense conspiracy.

116. This feature of the *Coplan* case is not discussed in the CTM.

C. *FBAR Violations*

Report of Foreign Bank and Financial Accounts (FBAR) criminal and civil tax initiatives have been a major component of tax enforcement recently. United States persons with a financial interest or signatory authority over foreign accounts are required to file FBARs by June 30th of each year.<sup>117</sup> The FBAR form is just an information form. Civil and criminal penalties apply if the FBAR is not filed or if an erroneous FBAR is filed.<sup>118</sup> Taxpayers often fail to file FBARs in order to conceal tax evasion through not reporting the income from the accounts on their income tax returns.<sup>119</sup> When FBAR violations relate only to tax crimes, the courts determine the Guidelines BOL under the tax crimes provisions in section 2T1, which is driven by the tax loss. This requires some explanation.

The starting point in the Guidelines for monetary report violations, including FBARs, is chapter 2, part S. The starting point for tax violations is chapter 2, part T. You will recall that the methodology in chapter 2 of the Guidelines is to determine a BOL with certain adjustments before moving on to the other adjustments in chapters 3 and 4.

The chapter 2, part S calculations, specifically Guidelines section 2S1.3, are at first glance very ugly. The chapter 2 offense level is calculated as a monetary crime (theft) keyed to the amount that is not reported on the FBAR. The chapter 2, part T calculations, by contrast, key the chapter 2 offense level to the amount of tax evaded. The result is that the offense level under part S can move up far quicker than the offense level under part T. I will not get into the details of how that works, but I do provide a summary guide with precautions in the footnote.<sup>120</sup>

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117. See 31 U.S.C. § 5314 (2012); 31 C.F.R. § 103.24 (2013).

118. See 31 U.S.C. § 5322(a) (addressing criminal penalties); *id.* § 5321(a)(5)(B)(i) (addressing civil penalties). One counterintuitive result for a false FBAR is the possibility, suggested by an IRS counsel in a panel discussion, that the relevant Bank Secrecy Act (BSA) criminal statutes perhaps do not really cover a false FBAR, so that, at least in his experience, the principal and perhaps only charge would be a false statement charge under 18 U.S.C. § 1001. This merely illustrates the truism that there are overlapping criminal charges that the Government can pursue, so that avoiding one only to draw another may be a pyrrhic victory.

119. The Code requires taxation of all income from whatever source derived. 26 U.S.C. § 61(a) (2012). There is no exclusion for income sourced outside the United States. See *id.*

120. See U.S. SENTENCING GUIDELINES MANUAL § 2S1.3 (2013); *id.* ch. 2, pt. T. The FBAR violations are sentenced under chapter 2, part S. Section 2S1.3, which normally keys the offense level to the theft table in section 2B1.1, provides certain adjustments in section 2S1.3(b). See *id.* § 2S1.3(b). The first two of those adjustments relating to illegal activity increase the offense level determined under the theft table, but the third, which applies if the first two do not, decreases the offense level to six. See *id.* The cross-reference in section 2S1.3(c) says the offense level for tax crimes is determined under chapter 2, part T if higher than the section 2S1.3 offense level. *Id.* § 2S1.3(c). In monetary offenses keyed to the gross value, rather than taxes resulting from the gross value, the part T tax offense level will usually not be higher than the part S offense level unless the part S offense is reduced to

D. *Tax Loss in the Section 3553(a)/Booker Phase of Sentencing*

We observed an instance of where the sentencing court's dissatisfaction with the tax loss calculations was fixed by application of a section 3553(a)/Booker variance. In that case, the Guidelines calculation was too low because of an underinclusive interpretation of the definition of tax

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six. So, the "holy grail" is to make sure that the part S offense level is reduced to six. Otherwise, the part S offense level will usually greatly exceed the part T offense level, and the part S offense level will apply. To repeat, you get to offense level six only if the first two adjustments in section 2S1.3(b) and certain other conditions do not apply.

For those wanting to follow through on that (particularly important if the defendant is charged or agrees to plea to an FBAR violation), you will have to parse the first two exceptions in section 2S1.3(b). See *id.* § 2S1.3(b). They are not models of clarity, and I am not aware of any authoritative interpretations of those first two exceptions. You will have to research and reach your own conclusions, but, as noted, you do not want either of those exceptions to apply, because the resulting part S offense level will be higher than the part T offense level, which requires that the part S offense level apply. I would offer more of a discussion of those two exceptions, except that certain anecdotal evidence from the recent plea agreements to FBAR violations in tax crime settings suggests that all of the parties—the defendants, the prosecutors, the probation office, and the courts—seem to assume that the base offense level is under part T rather than part S, which necessarily means that they believe the first two section 2S1.3(b) exceptions do not apply, and thus, the third exception applies and drops the part S minimum offense level to six. Having said that, I should also note that one experienced litigator commented—during the meeting of the Civil and Criminal Penalties Section at the 2011 ABA Tax Section Meeting—that the USAO for the Southern District of New York interpreted FBAR violations in a tax setting to invoke one of the two adjustments in section 2S1.3(b), thus precluding application of the Tax Guidelines under section 2T1.

I think the concern related to section 2S1.3(b)(2)(B) is that it applies and increases the BOL by two levels if the defendant "committed the offense [the FBAR] as part of a pattern of unlawful activity involving more than \$100,000 in a 12-month period . . ." *Id.* § 2S1.3(b)(2). In a legal source and use of proceeds case, the question would be whether this could apply if more than \$100,000 is involved in each year and there is a failure to file the FBAR for several years, making it a pattern of "illegal" activity.

Therefore, anyone representing a person charged with an FBAR violation must reach his or her own level of comfort on this issue. I do not think it is self-evident from the actual words used. I do think, however, that the sense of the exceptions is that they should not apply in a legal source and use income tax case. Note that a similar issue of interpretation of this language is presented in 31 U.S.C. § 5322(b) that, on parallel language, doubles up the criminal penalties for FBAR and other BSA violations. See 31 U.S.C. § 5322(b). I reached a similar conclusion in discussing that statute not because the text compels it, but because the anecdotal evidence indicates that the language is interpreted not to apply to legal source income tax violations. I should finally caution that this anecdotal evidence may even be a form of dicta, because in these anecdotal plea settings it was clear that the actual *Booker* sentence would never get above the base level provided in section 5322(b) and would not be as prescribed in Guidelines section 2S1.3 by reference to the theft table. See *id.*; see also U.S. SENTENCING GUIDELINES MANUAL § 2S1.3 (2013). Caution is in order. See Jack Townsend, *Sentencing Simon (Preliminary and Final)*, FED. TAX CRIMES BLOG (Mar. 18, 2011, 3:07 PM), <http://federaltaxcrimes.blogspot.com/2011/03/preliminary-sentencing-findings-in.html> (providing example of calculation under Guidelines section 2S1.3).

loss. Let's look at a recent case where the defendant urged that the Guidelines tax loss calculation stipulated in the plea agreement was too high, and, if the defendant could not fix the problem in the Guidelines calculation itself, he should have been allowed to fix it via section 3553(a)/Booker discretion.

In that case,<sup>121</sup> the defendant pled to five counts of tax evasion.<sup>122</sup> Based on a stipulated loss of \$2.4 million, the indicated Guidelines range was thirty-three to forty-one months. Exercising its variance authority under section 3553(a), the sentencing court sentenced the defendant to thirty months, a three-month variance from the bottom end of the Guidelines range.<sup>123</sup> At sentencing, the defendant attempted to revise the stipulated \$2.4 million tax loss down to \$40,000, obviously a substantial reduction. Apparently concerned about the veracity of the \$40,000 tax loss claim, the sentencing court refused to change the tax loss for sentencing or to relieve him from the plea agreement. The defendant had waived his right to object and, the sentencing court reasoned, a deal is a deal. The defendant argued that, notwithstanding the sentencing court's refusal to relieve him of the \$2.4 million stipulation for purposes of the Guidelines calculations, the court could and should nevertheless consider the \$40,000 tax loss for purposes of calibrating a just sentence under the mandate of section 3553. The court of appeals held that the stipulation by its terms was binding "for sentencing" and not just for the Guidelines range calculations.<sup>124</sup> That stipulation, of course, is not binding on the sentencing court, but even where the sentencing court could reject the stipulation, there is no requirement that the sentencing court reject the stipulation. And, of course, the sentencing court's skepticism about the validity of the claimed \$40,000 tax loss was a factor.<sup>125</sup>

Basically, I surmise, the defendant just did not convince the court that the quality of his evidence or proffer raised a real legitimate claim that the tax was \$40,000 rather than \$2.4 million (or some material number less than \$2.4 million). If the defendant had done so, I suspect that the prosecutors or the sentencing court would have found some way to give the defendant all or most of the credit for the reduction, notwithstanding the stipulation in the plea agreement.

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121. *United States v. Yoocho Weon*, 722 F.3d 583 (4th Cir. 2013).

122. *Id.* at 585. It is not clear why the Government insisted on a plea to five counts, because the Guidelines range considering relevant conduct or, it seems to me, any reasonably expected variance, would all fit within the incarceration permitted by a single count of tax evasion (sixty months). Often more counts are required in order to get the number of maximum months via stacking indicated by the pattern of conduct, but that seems not to have been the case in *Yoocho Weon*. See *id.*

123. *Id.* at 587.

124. *Id.* at 589.

125. See *id.* at 587.

### III. RESTITUTION

#### A. *General*

Statutory restitution (as opposed to contractual restitution) is permitted only for the count(s) of conviction and thus, unlike tax loss, does not include relevant conduct.<sup>126</sup> However, if the count of conviction is broadly worded to cover a scheme, conspiracy, or pattern of criminal activity, the scope of restitution can include reasonably foreseeable tax loss attributable to that activity, even if not separately charged or convicted.<sup>127</sup>

#### B. *Restitution in Tax Cases*

Tax crimes under title 26 are not included among the offenses for which restitution is authorized in the statutes. Statutory restitution is thus not allowed for a pure tax offense of conviction.<sup>128</sup> Of course, if the count(s) of conviction include(s) a conspiracy (either an offense conspiracy or a *Klein* defraud conspiracy), or some other title 18 offense, statutory restitution is permitted.<sup>129</sup> Finally, given the charging choices the prosecutors have and the incentives for a defendant to plead with a requirement of contractual restitution, the DOJ Criminal Tax Manual (CTM) notes that “in virtually every criminal tax case in which it is appropriate, there is a way to obtain restitution.”<sup>130</sup>

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126. DOJ CTM, *supra* note 9, § 44.03[2][a].

127. *See* 18 U.S.C. § 3663(a)(2) (2012). This provision can apply even to acquitted conduct within the scope of the broader convicted conduct. *See* DOJ CTM, *supra* note 9, § 44.03[2][b] (citing *United States v. Foley*, 508 F.3d 627, 635–36 (11th Cir. 2007)) (observing that restitution amount properly included acquitted conduct and district court could award restitution to any victim of scheme furthered by defendant’s mail fraud offense); *see also* *United States v. Brock-Davis*, 504 F.3d 991, 998–99 (9th Cir. 2007) (noting that restitution may be ordered for losses to persons harmed in course of defendant’s scheme even beyond counts of conviction).

128. *See* *United States v. Minneman*, 143 F.3d 274, 284 (7th Cir. 1998) (citing *United States v. Gottesman*, 122 F.3d 150, 151 (2d Cir. 1997)); *see also* *United States v. Stout*, 32 F.3d 901, 905 (5th Cir. 1994).

129. *See* 18 U.S.C. § 3663(a)(1)(A); DOJ CTM, *supra* note 9, § 44.02[1]–[2]. For a case discussing restitution when title 18 hooks into what is really a tax offense, *see Minneman*, 143 F.3d at 284 (citing *United States v. Helmsley*, 941 F.2d 71, 101 (2d Cir. 1991)). For this reason, the Government will charge some tax offenses under title 18 rather than title 26. *See* DOJ CTM, *supra* note 9, § 22.02[1] (noting that false refund claim cases can be prosecuted as tax crimes under title 26, for example, under section 7206(1)–(2), but are charged under title 18 “because restitution for Title 18 offenses is more readily available than for Title 26 offenses”).

130. DOJ CTM, *supra* note 9, § 44.01. The DOJ CTM also provides the following statement in a footnote, expanding on the statement in the text above: “Of course, there are exceptions. There are a number of factors the district court will have to consider in determining whether to impose *discretionary* restitution. An important factor is the defendant’s ability to pay.” *Id.* § 44.01 n.2 (citing 26 U.S.C. § 3663(a)(1)(B)(i)(II)).

The amount for restitution is not the same as for the tax loss, even for the count(s) of conviction. The CTM explains:

The calculation of the amount of loss for purposes of restitution when the IRS is the victim may be closely related to the calculation of the tax loss used to determine a defendant's base offense level. But tax loss under the Sentencing Guidelines is usually the intended loss, while the amount of restitution is always limited to an actual loss. Thus, tax loss may be greater than the amount of restitution. Generally, however, the district court may rely upon the same "quantity and quality of evidence" to determine the amount of loss in both contexts.<sup>131</sup>

Restitution, being the actual loss, thus would not be subject to the denial of the benefit of unrelated, unclaimed deductions now required for tax loss calculations. Furthermore, the defendant often will have paid some of the tax loss prior to sentencing. Hence, the restitution amount will often be less than the tax loss amount.

One incentive for the defendant to agree to restitution beyond the count(s) of conviction is that it permits the defendant to argue that the defendant has made what some practitioners call "extraordinary restitution," which I am led to believe simply describes restitution beyond that which a court could impose without the taxpayer's contractual agreement or voluntary payment. The statutes and Guidelines do not address that concept, but, based on anecdotal hearsay evidence, some practitioners believe that it plays well with some sentencing judges.

That statutory restitution is not required for title 26 tax crimes is not an anomaly. In tax cases, of course, the victim is the United States, and the harm is the tax not paid. The United States has "elaborate procedures" for determining and collecting tax independent of the criminal system.<sup>132</sup> As noted below, this system will be engaged after the criminal case is concluded, at least when the *taxpayer* is the criminal defendant. The IRS will conduct such further investigation as necessary to determine the correct civil tax liability and then send a notice of deficiency for the taxes due. As also noted, the amount the taxpayer may owe for civil tax purposes may be larger—sometimes much larger—than the tax evaded number used in the prosecution or in sentencing.<sup>133</sup> Accordingly, restitu-

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131. *Id.* § 44.03[5]. The Seventh Circuit has recently cautioned: District courts can get into trouble if they rely unquestioningly on these figures [the equation of tax loss and restitution], however, because the loss amount for sentencing considers not just the conduct underlying the conviction but "relevant conduct" accompanying it. Calculations for restitution are not so permissive. They are rigidly compartmentalized to the actual losses resulting from the conduct of the convicted offenses. *United States v. Berkowitz*, 732 F.3d 850, 853 n.3 (7th Cir. 2013) (citation omitted).

132. See *Minneman*, 143 F.3d at 285–86.

133. See DOJ CTM, *supra* note 9, § 44.06. The CTM provides:

tion is not available in tax cases, except where the defendant consents to it in the plea agreement or the sentencing judge orders it as a condition of some benefit that the defendant is not otherwise entitled to.<sup>134</sup>

For the taxpayer defendant, an obligation of restitution for the tax evaded is, of course, redundant with the underlying obligation (at least the portion of the tax obligation—underpayment or “deficiency” in tax speak—attributable to fraud).<sup>135</sup> As noted, the IRS has elaborate mechanisms to determine and assess the amount of the tax and to collect the amount so assessed. So, the imperative to order restitution in the criminal phase, even if there is a required title 18 offense, is not so great. As to taxpayers who are defendants ordered to pay restitution, therefore, there is some redundancy, although there are some differences discussed later in this section.

But, enablers—persons other than the taxpayer whose taxes are involved—may be convicted of tax crimes, including tax evasion. Particularly where the Government is for some reason unable to collect from the taxpayers, the Government may seek an order of restitution from convicted enablers who are often convicted for a title 18 crime, such as the *Klein* conspiracy.<sup>136</sup> If the Government does seek restitution, it will have

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Prosecutors should remember that, as discussed in Section 44.03 above, restitution in criminal tax cases is limited only to losses caused by the criminal conduct of the defendant and generally does not include penalties or amounts of tax related to purely civil items. Therefore, in all criminal tax cases in which a restitution order is contemplated, care should be taken not to compromise the ability of the IRS to attempt to collect the civil tax liability, interest, and penalties.

*Id.*

134. See *Weinberger v. United States*, 268 F.3d 346, 358 (6th Cir. 2001); see also *United States v. Anderson*, 545 F.3d 1072, 1078–80 (D.C. Cir. 2008). The court in *Anderson* permitted plea agreement restitution in what was then the largest tax crime conviction, even though (i) the plea agreement cited the wrong title 18 section, a phenomenon the Government urged and the court held was a scrivener’s error that did not vitiate the parties’ meeting of the minds to agree to restitution; and (ii) the plea agreement did not state an amount for restitution. See *Anderson*, 545 F.3d at 1078–80. In *United States v. Hammon*, the court found that the plea agreement contract restitution provision did not state that the restitution amount was the proper tax liability and that it at most was ambiguous. See *United States v. Hammon*, 277 F. App’x. 560, 565 (6th Cir. 2008). Hence, the defendant was permitted to contest the amount in the subsequent civil tax proceeding. See *id.*

135. For this reason, the restitution amounts are assessed and payments on restitution for tax liabilities are credited to the corresponding tax liability. See *Restitution Payable to the IRS*, IRM 5.1.5.24.1(3), (5) (Aug. 3, 2009); see also I.R.S. Small Bus. & Self-Emp’d Div. Mem. SBSE-05-0713-0044 (July 10, 2013), available at <http://www.irs.gov/pub/foia/ig/spder/SBSE-05-0713-0044.pdf>. See below for prompt assessment procedures applicable to tax restitution.

136. See 18 U.S.C. § 371 (2012); *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957). There might be an issue if the enabler is only convicted of the crime of tax evasion, a title 26 crime, via 18 U.S.C. § 2 (aiding and abetting and causing liability). See 18 U.S.C. § 2. This title 18 provision adopts the construct of making the actor a principal in the crime aided, abetted, or caused. The crime that they are thus made principals of is tax evasion, a title 26 crime, for which restitution is not

to prove the amount of the restitution or get the defendant to agree. In the sentencing phase where this is relevant, the Government's standard of proof is only a preponderance of the evidence, not beyond a reasonable doubt as required for conviction of the substantive criminal charges.

Although the statute does not permit restitution for title 26 crimes of conviction, the court may provide restitution for such crimes of conviction in the following instances. First, 18 U.S.C. § 3663(a)(3) permits a court to order restitution if the parties agree to it.<sup>137</sup> The plea agreement is a contract. It may be enforced as a contract, and the sentencing court may include the agreements reached in the sentencing terms. Thus, if the parties in the plea agreement provide for restitution, the court may impose that term.<sup>138</sup>

Second, the court may impose restitution as a condition of some benefit that it is giving the defendant, such as probation or supervised release.<sup>139</sup> If the defendant wants the benefit, the defendant has to accept the restitution cost of the benefit.<sup>140</sup> Where the court orders restitution on this basis, like other statutory restitution, it is limited to the tax evaded for the count(s) of conviction.<sup>141</sup>

Moreover, the district court can achieve most of the same effect as restitution by ordering, as a condition of supervised release or pursuant to the plea agreement, that the defendant file correct delinquent or amended past year tax returns and pay any resulting unpaid tax.<sup>142</sup> The

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allowed by the statutes. *See id.*; *see also* John A. Townsend, *Theories of Criminal Liability for Tax Evasion* (Working Paper, 2012), available at <http://ssrn.com/abstract=2060496> (discussing constructs of 18 U.S.C. § 2). Hence, I question whether the statutory restitution provision would apply in such a case.

137. 18 U.S.C. § 3663(a)(3); *see also* DOJ CTM, *supra* note 9, § 44.03[8].

138. *See, e.g.*, *United States v. Miller*, 406 F.3d 323, 330 (5th Cir. 2005).

139. *See* 18 U.S.C. §§ 3563(b)(1), 3583(d); DOJ CTM, *supra* note 9, § 44.01[3]; *see also* *United States v. Batson*, 608 F.3d 630, 634 (9th Cir. 2010) (“The district court is therefore authorized by § 3563(b)(2) to order restitution as a condition of probation to the victim of any criminal offense, including those in Title 26, for which probation is properly imposed.”); *United States v. Nolen*, 523 F.3d 331, 332 (5th Cir. 2008) (ordering restitution as condition of granting supervised release); *United States v. Dahlstrom*, 180 F.3d 677, 686 (5th Cir. 1999); *cf. Miller*, 406 F.3d at 330 (declining to reach issue of whether, absent defendant’s consent to restitution, sentencing court could order restitution).

140. However, in *Miller*, the defendant argued, in effect, that he could bifurcate the restitution from the supervised release and, because he did not agree to restitution in the plea agreement, restitution could not be imposed. *Miller*, 406 F.3d at 328–29. The court rejected that idea. The court side-stepped the technical point *Miller* raised by finding that his plea agreement did authorize the restitution imposed. *Id.* at 329–30. Restitution as a condition of supervised release may include years other than the year(s) of the count(s) of conviction. *See* *United States v. Johnson*, No. 10-30911, 2011 U.S. App. LEXIS 22346, at \*6–7 (5th Cir. Nov. 4, 2011) (discussing this aspect of *Miller*).

141. *See Nolen*, 523 F.3d at 332.

142. *See* *United States v. Thomas*, 635 F.3d 13, 21–22 (1st Cir. 2011) (citing *United States v. Miller*, 557 F.3d 919, 921–22 (8th Cir. 2009)). In *Thomas*, the First Circuit held that (i) a district court can impose these obligations as a condition of

effect of such a generic order may sweep beyond the years for the count(s) of conviction. Such an order also requires the defendant to satisfy a tax obligation the defendant already has. And, since the obligation exists independent of restitution, the Government can rely upon collection tools for that obligation, which, as noted above, are more extensive than restitution collection tools.<sup>143</sup> Practically, an order to comply with past tax obligations achieves most of the effects of an order of restitution.<sup>144</sup>

DOJ Tax has a policy that prosecutors “must consider” including a restitution requirement in the plea agreement for a criminal tax case.<sup>145</sup> Further, restitution is the rule, rather than the exception, and it is available by plea agreement in virtually every criminal tax case.<sup>146</sup> This means that restitution will be included, barring some compelling reason not to. Furthermore, the plea agreement restitution amount will (i) include not only the amount for the agreed count(s) of conviction, but also relevant conduct for the dismissed counts and non-charged years, and (ii) will avoid language committing the IRS to that amount as the ultimate civil tax liability (there may be noncriminal adjustments that support a higher ultimate tax liability).<sup>147</sup>

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supervised release, and (ii) “[t]he district court was not ordering Thomas to compensate the government for a loss suffered as a result of his criminal actions, though this is a salutary side-effect of its order.” *Id.* at 21; *see also* United States v. Perry, 714 F.3d 570, 577 n.5 (8th Cir. 2013) (“Another way to impose essentially the same special condition is to require that the defendant while on supervised release comply with the tax laws and cooperate with the IRS by filing tax returns and paying amounts due. . . . [T]his type of condition is *not* an order of restitution . . . .”); United States v. Shaw, 446 F. App’x 357, 359 (2d Cir. 2011) (citing United States v. Gottesman, 122 F.3d 150 (2d Cir. 1997)) (distinguishing *Gottesman*, where court’s order was generic to pay past due taxes as agreed in future between defendant and IRS).

143. I note below in the text that Congress has provided for the IRS to be able to assess promptly and collect the amount in tax restitution orders in some cases. The IRS cannot assess immediately if the obligation is a general order to comply with past tax filing and payment obligations, and the IRS will then have to go through the Code procedures predicate to assessment—issuing a notice of deficiency permitting the taxpayer to litigate in the Tax Court prior to assessment.

144. *See Thomas*, 635 F.3d at 21 (“The district court was not ordering Thomas to compensate the government for a loss suffered as a result of his criminal actions, though this is a salutary side-effect of its order.”).

145. *See* DOJ CTM, *supra* note 9, § 44.01. The Attorney General’s Guidelines state that “[i]n all plea discussions, prosecutors must consider ‘requesting that the defendant provide full restitution to all victims of all charges contained in the indictment or information, without regard to the counts to which the defendant actually plead[s].’” *Id.* (citing USAM, *supra* note 9, §§ 9-27.230, 9-27.420, 9-27.430); *see also* USAM, *supra* note 9, § 6-4.370; IRS/DOJ MEMO RE STANDARD LANGUAGE, *supra* note 44.

146. *See* DOJ CTM, *supra* note 9, § 44.01.

147. *See id.* § 5.01[7]. The criminal tax process is not suited to determine the actual civil tax liability. From the investigation through sentencing, the process is focused on the criminal tax numbers (usually the same as the tax loss for sentencing). There may be any number of difficult and uncertain civil tax adjustments that do not get resolved any time during the sentencing process and are better resolved later through the civil adjustment processes allowed by the IRS. Having

Restitution of the tax liability may include both the principal and the statutory interest.<sup>148</sup> This is not true of the tax loss for sentencing except in evasion of payment cases.<sup>149</sup> Some courts have used fines as a substitute for restitution in tax cases. In a recent section 7202 case involving unpaid taxes withheld from employees, the tax loss substantially exceeded the indicated fine range under the Sentencing Guidelines. The sentencing court noted that it could not order restitution but, at the Government's request, could impose a fine outside the Guidelines range based upon section 3571's grant of authority to impose an "alternate fine based upon gain" to the defendant.<sup>150</sup> I suggest, however, that use of the fine in this way is only appropriate in cases where the IRS does not have the ability to assess the tax in issue against the defendant, otherwise, there will be double collection of the tax—once as a tax<sup>151</sup> and once as a fine that would not otherwise have been imposed.

#### IV. TAX LIABILITY AFTER SENTENCING

##### A. *Restitution (Enforcement, Assessment, and Payment)*

###### 1. *Restitution Generally*

Restitution is a lien enforceable like other liens, including tax liens, but does not have the special Code enforcement measures that tax liens

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said that, in a panel discussion in which I participated, an IRS attorney with criminal enforcement responsibilities said that, in his geographical areas of responsibility, the IRS would often agree contemporaneously with sentencing to close out the civil tax liability through a closing agreement, Form 906. That document is not filed with the court, but will close out the civil tax liability.

148. See 26 U.S.C. § 6601 (2012). Interest accrues on a tax liability as a matter of law. See *id.* The interest represents a loss to the Government and thus may be included in restitution. See *United States v. Perry*, 714 F.3d 570, 577 (8th Cir. 2013) (citing "United States v. Ellefsen, 655 F.3d 769, 782 (8th Cir. 2011) (affirming a restitution award to IRS that included interest); [United States v. Hassebrock, 663 F.3d 906, 926 (7th Cir. 2011)] (same); United States v. Qurashi, 634 F.3d 699, 703–04 (2d Cir. 2011)").

149. See U.S. SENTENCING GUIDELINES MANUAL § 2.T1.1 cmt. n.1 (2013). Normally, where a defendant pleads to evasion of assessment, the court would not permit including interest and penalties in calculating the tax loss. See *id.* However, where the defendant committed acts of evasion of payment, the tax loss can include interest on that relevant conduct tax loss. See *Thomas*, 635 F.3d at 17–18.

150. *United States v. Ellis*, 548 F.3d 539, 546 (7th Cir. 2008). Note that for this type of tax liability, the IRS certainly could have assessed the tax against the defendant under section 6672, so it had the usual tax tools to collect the tax from the defendant. See 26 U.S.C. § 6672. It is unclear from the cryptic *Ellis* decision why the Government felt that using the power to depart from the Guidelines fine was appropriate in that particular case. See *Ellis*, 548 F.3d at 546. The reason this is important is that unexplained use of the fine power would seem to be contrary to the intent of Congress not to require restitution in tax cases.

151. Or, in the case posited, as a trust fund recovery penalty under section 6672. See *Ellis*, 548 F.3d at 539; see also 26 U.S.C. § 6672.

have.<sup>152</sup> Restitution (whether for taxes or otherwise) may be enforced under the Federal Debt Collection Procedures Act (FDCPA).<sup>153</sup> The Government's ability to enforce restitution under the FDCPA is made subject to the Consumer Credit Protection Act (CCPA),<sup>154</sup> but if the restitution is for taxes, the garnishment restrictions of the CCPA are not applicable.<sup>155</sup> Restitution also may be enforced by administrative offset under the Treasury Offset Program, whereby the Treasury can offset nontax debts—for this purpose, restitution itself is nontax even though it relates to the tax liability—against other amounts due to the defendant from the Government (including refunds).<sup>156</sup>

Finally, restitution obligations are not subject to discharge in bankruptcy, and the automatic stay provisions of bankruptcy do not preclude enforcement of restitution, including proceeding against the debtor's property and any property nominally held by the bankruptcy estate and revocation of probation for violation of the restitution order.<sup>157</sup>

## 2. *Tax Restitution*

Historically, after sentencing, the IRS would pursue the normal tax assessment and collection measures for tax restitution (plus any additional civil tax liability not included in restitution). Practitioners are quite familiar with those measures, so I will just summarize them here. Since the taxes usually will not have been assessed, the IRS must first assess the tax. At a minimum, assessment will require an open statute of limitations,

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152. See 18 U.S.C. § 3664(m)(1)(A) (2012); *id.* § 3613. As to restitution, see particularly section 3613(c) and (f). See *id.* § 3613(c) (“[A]n order of restitution . . . is a lien in favor of the United States on all property and rights to property of the person fined as if the liability of the person fined were a liability for a tax assessed under the Internal Revenue Code of 1986.”); *id.* § 3613(f) (“[A]ll provisions of this section are available to the United States for the enforcement of an order of restitution.”); see also *United States v. DeCay*, 620 F.3d 534, 541 (5th Cir. 2010).

153. 28 U.S.C. § 3205 (2012); see also 18 U.S.C. § 3664(m)(1)(A); *United States v. Clayton*, 613 F.3d 592, 596 (5th Cir. 2010) (“The United States is authorized to enforce any restitution order imposed as part of a criminal sentence by using its powers under the FDCPA.”); *United States v. Phillips*, 303 F.3d 548, 550–51 (5th Cir. 2002) (explaining FDCPA in detail).

154. 15 U.S.C. § 1673 (2012).

155. *Clayton*, 613 F.3d at 596.

156. See I.R.S. Tech. Adv. Mem. PMTA 2011-034 (Apr. 26, 2010), available at [http://www.irs.gov/pub/lanoa/pmta\\_2011-34.pdf](http://www.irs.gov/pub/lanoa/pmta_2011-34.pdf).

157. See *United States v. Robinson*, 494 B.R. 715, 718–19 (W.D. Tenn. 2013). Section 3613(a) provides that “[n]otwithstanding any other Federal law . . . a judgment imposing [restitution] may be enforced against all property or rights to property of the person [ordered to pay restitution] . . . .” 18 U.S.C. § 3613(a). In a well-reasoned opinion, *Robinson* held that this language trumps the automatic stay both as to the debtor and to the nominal transfer of the debtor's property to the bankruptcy estate. See *Robinson*, 494 B.R. at 718–19; see also *United States v. Colasuonno*, 697 F.3d 164, 174 (2d Cir. 2012) (holding that probation revocation proceedings for failure to pay restitution imposed as condition of probation are not subject to bankruptcy automatic stay).

which will usually exist if the defendant has been criminally prosecuted.<sup>158</sup> And, the IRS must do all predicate acts for assessment, which, most importantly, include issuing a notice of deficiency for income and estate and gift taxes.<sup>159</sup> This procedure will permit a taxpayer to delay assessment by filing a Tax Court proceeding.

In 2010, Congress enacted provisions to make the amount ordered for restitution of tax immediately assessable and collectible without the usual predicate notice of deficiency.<sup>160</sup> The IRS is required to assess the restitution amount once the criminal judgment becomes final.<sup>161</sup> A notice of deficiency is not required as a predicate to assessment of the restitution amount.<sup>162</sup> The defendant/taxpayer may not thereafter contest civilly the tax restitution amount so assessed.<sup>163</sup> Although it is clear that the provision applies to tax restitution ordered for a count of conviction under title 26 of the Internal Revenue Code, it is perhaps not clear that

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158. See 26 U.S.C. § 6501(c)(1) (2012).

159. See *id.* § 6213(a). I am not sure whether this statute applies as to restitution for taxes for which the defendant is not liable as the taxpayer. For example, assume that the defendant is convicted under section 7202 for failure of the employer for whom he or she worked to withhold and pay over taxes on employees. The defendant may be ultimately liable under section 6672 for the trust fund recovery penalty, but the underlying tax liability is the employer's tax liability and not the defendant's. The trust fund taxes can be awarded as restitution (either statutory if the offense of conviction included a title 18 offense or contractual if the defendant pled guilty), but the tax is still not the defendant's tax and that restitution amount cannot be assessed against the defendant. All that means as a practical matter is that the considerable tax collection measures offered by the Code are not available; the less considerable (but still considerable) general restitution enforcement provisions will be available. See *id.*

160. See Firearms Excise Tax Improvement Act of 2010, Pub. L. No. 111-237, § 3(a), 124 Stat. 2497, 2497-98 (codified at 26 U.S.C. § 6201(a)(4)) (making Act effective for restitution orders entered after August 16, 2010).

161. See 26 U.S.C. § 6201(a)(4)(A), (B). However, apparently because the statutory language in section 6501(c)(11), dealing with these tax restitution assessments, is the same as the unlimited civil statute for fraud in section 6501(c)(1), there is no statute of limitations on assessing restitution for tax. See I.R.S. Notice ECC 201221014 (May 25, 2012), available at <http://www.irs.gov/pub/irs-wd/1221014.pdf>. This may not be important, given the authority to assess immediately, which the IRS will surely do in all but rare cases.

162. See 26 U.S.C. § 6213(b)(5).

163. See 26 U.S.C. § 6201(a)(4)(C). This provision is a bit odd, since even the IRS recently stated that, "[c]riminal restitution and civil tax liability are separate and distinct. The assessment of restitution under section 6201(a)(4) is not itself a determination of the actual civil tax liability for the tax period for which restitution was ordered, and is assessed only 'as if such amount were such tax.'" I.R.S. Small Bus. & Self-Emp'd Div. Mem. SBSE-05-0713-0044 (July 10, 2013), available at <http://www.irs.gov/pub/foia/ig/spder/SBSE-05-0713-0044.pdf>. Is it possible that restitution for the tax can exceed the amount of the tax? And, if so, is the defendant prohibited from contesting the amount of the tax via IRS processes? I have discussed various facets of this particular narrow issue on my *Federal Tax Crimes Blog*, which can be accessed by either searching "restitution" or clicking the link named "restitution." See Jack Townsend, FED. TAX CRIMES BLOG, <http://federaltaxcrimes.blogspot.com>.

the provision applies to tax restitution for a count of conviction under title 18 or, for that matter, an FBAR count of conviction under title 31.<sup>164</sup>

If the IRS determines that the tax liability exceeds the amount ordered as restitution, the IRS must follow the required procedures (notice of deficiency and subsequent assessment as allowed).<sup>165</sup>

Regardless of which procedure is used to make the tax assessment, the IRS is authorized after assessment to use its powerful non-judicial collection tools (lien and levy) to collect the assessed taxes.<sup>166</sup> Amounts paid as restitution for taxes are applied to the taxpayer's tax liabilities for the year(s) to which the restitution applies.<sup>167</sup> Practitioners should note that there is the possibility that restitution might actually exceed the tax liability as finally determined for the year(s) involved. That is particularly a problem under the new procedure discussed above where the taxpayer is not permitted to contest tax restitution assessed as a tax.<sup>168</sup> This can require the taxpayer to pay more tax as restitution than is actually due. The only solution, apparently, is to request the sentencing court to modify the order of restitution.<sup>169</sup>

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164. See I.R.S. Tech. Adv. Mem. CCA-111811-10 (Feb. 4, 2011), available at <http://www.irs.gov/pub/irs-wd/1105037.pdf>. This is an IRS email with an attached outline for a presentation within the IRS. This is not an official pronouncement from the IRS and the author of the outline is not identified. It is therefore not clear that this is anything like an authoritative interpretation of the statute. The outline states: "Our interpretation is that the assessed amount is *limited to losses attributable to Title 26 violations* and does not include Title 18, tax-related charges." *Id.* I have questioned this interpretation in my blog. See Jack Townsend, *New Statute for Civil Effect of Restitution in Tax Cases*, FED. TAX CRIMES BLOG (Feb. 11, 2011, 9:05 AM), <http://federaltaxcrimes.blogspot.com/2011/02/new-statute-for-civil-effect-of.html>.

165. Because the defendant is entitled to a notice of deficiency before assessment, under 26 U.S.C. § 6213(a), and to pursue the prepayment remedy in the Tax Court, that portion of the civil tax will be subject to the delays which are now foreclosed for the tax restitution.

166. For additional nuances of the statute, see my *Federal Tax Crimes Blog*, *supra* note 84.

167. See *Morse v. Comm'r*, 419 F.3d 829, 834 n.4 (8th Cir. 2005); *United States v. Helmsley*, 941 F.2d 71, 102 (2d Cir. 1991) ("[W]e believe it is self-evident that any amount paid as restitution for taxes owed must be deducted from any judgment entered for unpaid taxes in . . . a civil proceeding."); see also I.R.S. Chief Couns. Mem. 200734020 (Aug. 24, 2007), available at <http://www.irs.gov/pub/irs-wd/0734020.pdf>.

168. See I.R.S. Notice CC-2013-012 (July 31, 2013). I have discussed various facets of this issue on my *Federal Tax Crimes Blog*. See Jack Townsend, *Can Restitution Be Reduced by Payments on the Tax Liability Subject to Restitution?*, FED. TAX CRIMES BLOG (Oct. 26, 2013, 3:43 PM), <http://www.federaltaxcrimes.blogspot.com/2013/10/can-restitution-be-reduced-by-payments.html> (linking to earlier discussions).

169. One opportunity to contest the amount possibly exists where the IRS claims tax liability in addition to the amount of the tax restitution, requiring issuance of a notice of deficiency. The defendant could petition the Tax Court and argue that, not only is there no deficiency as alleged by the IRS, but that, by paying the restitution amount previously assessed, the taxpayer has overpaid the tax. The Tax Court has jurisdiction to determine an overpayment. See 26 U.S.C. § 6512(b)(1) (2012). Could the Tax Court determine the overpayment? As a mat-

Practitioners should be alert to creative payments of restitution. There may not be many such opportunities, but consider the recent holdings in two companion United States Tax Court cases.<sup>170</sup> The facts were that the taxpayers were officers and owners of a payroll service company that withheld from employees' salaries (including their own salaries as employees) but did not pay over the withheld trust fund taxes (or related employer taxes) to the IRS. The defendants alleged, apparently credibly, to the Tax Court trial judge, that they did not know of the alleged failure to pay over. The defendants also failed to file their individual income tax returns and were prosecuted as a result.<sup>171</sup> For purposes of the criminal case, the prosecutors and taxpayers agreed that the employer had withheld about \$510,000 in income tax from salaries and therefore that, in computing the tax loss and restitution, the taxpayers were entitled to credit for the withheld income tax. As a result, for tax loss and restitution purposes, they stipulated in the plea agreement, and the sentencing court found, that the tax loss and restitution were only \$60,000, representing the net tax due in excess of the deemed "withheld" tax of \$510,000. Note that in these calculations, the benefit to employees who fail to file is credit for the withheld tax from the original due dates of the returns, thus saving substantially on any civil penalties and interest that might otherwise apply. But the net \$60,000 unpaid on the original due dates of the returns was still due and subject to penalties and interest if the action had stopped there. Orchestrated by their counsel, the taxpayers then belatedly paid about \$570,000—representing the aggregate of the withheld tax on their salaries (\$510,000) and the unpaid tax due (\$60,000)—to the corporation and had the corporation pay it to the IRS with a direction that it be applied to the taxpayers' income tax liabilities as withholding.<sup>172</sup>

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ter of jurisdiction? As a matter of finality, using concepts of collateral estoppel? As a matter of statutory interpretation based upon the finality clearly intended by the tax restitution assessment provision? Then, would the IRS have to refund?

170. See *Dixon v. Comm'r*, 141 T.C. No. 3 (2013); *Dixon v. Comm'r*, 106 T.C.M. (CCH) 225 (2013).

171. See *Dixon*, 141 T.C. No. 3 at \*1. The taxpayers were not prosecuted for the employer corporation's failure to withhold. As presented by the tax court judges, they credibly testified that they did not know about the failure to withhold. Apparently for that reason, the Government did not prosecute for that failure. See *id.* at \*3. The amount of taxes that were not withheld (including those attributable to all employees, including the taxpayers) was nearly \$23 million. *Id.* Later, while the tax court case was pending, the taxpayers were operating another payroll service company, which failed to pay over the withheld trust fund taxes. The taxpayers were prosecuted again, this time for tax evasion. *Id.* at \*13. In that proceeding, according to the plea documents (not mentioned in the cases), the corporation's withheld, but not paid over trust fund taxes were included in relevant conduct. See *id.*

172. It is not clear to me why the defendants paid the amount for which they already had received credit against income tax for the amount contemporaneously withheld. They likely would have received credit in any subsequent civil proceeding—as they actually did in this case.

The taxpayers received credit as a payment on the original due dates for the originally withheld portion (\$510,000) and received credit for the originally non-withheld portion of \$60,000 but were only given that credit from the date the corporation paid the amount. Of course, the lion's share of the amount thus credited avoided penalties and interest at the taxpayers' level (which is the normal consequence of withholding), but the other portion not actually withheld contemporaneously did not receive credit on the original due date of the taxpayers' returns and thus was subject to penalties and interest at the taxpayers' level.<sup>173</sup> This type of restitution payment was creative, although not successful in part.

B. *The Civil Tax Audit/Notice of Deficiency—The Civil Tax Number/Deficiency*

The IRS may also assert the unpaid civil tax liability by audit, which, as noted above, will exceed the amount of the restitution ordered by the court. If the sentencing court does not include interest in restitution, the assessment will include the interest. Further, even if the sentencing court does include interest in restitution, it will include further interest from the date of the restitution order. And, in all likelihood, penalties will be assessed on at least the restitution amount and perhaps some of the other portions of the tax ultimately assessed. The normal tax collection measures will then be available to the IRS to collect any portion of the unpaid assessments.

As noted above, the taxpayer is bound civilly by the amount of restitution determined in the criminal case. But, as noted, the IRS can assert more tax and penalties (with resulting interest) than were determined for restitution.

An issue that may arise is whether either party may be bound by other determinations made during the criminal process. For example, in the sentencing phase, the court is required to make determinations of the tax loss. Is that preclusive? Of course, if the taxpayer has not paid any of the tax loss, the tax loss and the restitution may be in the same amount. But what if the taxpayer has, prior to sentencing, fully paid the tax and even

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173. It is unclear whether obtaining avoidance of penalties and interest at the shareholder level was the goal of shuffling the monies through the corporation for payment on withholding tax. The taxpayers' lawyer testified that the shuffling was intended only to ensure that the corporation got the credit against the \$23 million trust fund tax that it owed. The tax court trial judge questioned that because the corporation would be entitled to that credit had the taxpayer paid the \$60,000 taxes directly. Rather, that judge seemed to imply that the shuffling through the corporation was an attempt to wipe out the penalties and interest on the \$60,000, just as the penalties and interest had been wiped out on the original deemed withheld amount of \$510,000. The taxpayers' lawyer seemed to deny that, though. One of the mysteries is the advantage to the taxpayers of even paying the \$510,000 portion for which they were entitled to credit against their liabilities on the original due date of the return. The taxpayers' attorney testified that they did it to claim extraordinary restitution, which, although not a Sentencing Guidelines factor, could play well to a sentencing judge when sentencing the taxpayers.

the penalties that might apply? Can that taxpayer then assert that the IRS is bound by the tax loss determination? Can the IRS assert that the taxpayer is bound by the tax loss determination?

The traditional way to approach potential binding effects of previously litigated issues in this context is via the doctrine of collateral estoppel. In *United States v. Montana*,<sup>174</sup> the Supreme Court summarized the doctrine of collateral estoppel as follows: “[O]nce an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.”<sup>175</sup> Courts have rejected taxpayer attempts to collaterally estop the IRS in subsequent civil cases as to the amount of the tax loss determined by the sentencing court.<sup>176</sup> I think that makes sense. As noted above, the tax loss is not the same as the tax the taxpayer may owe. The tax loss is only the portion of the tax the taxpayer owed that is attributable to fraud. The taxpayer may owe more tax that is not attributable to fraud. The taxpayer should not get a benefit from the criminal prosecution of paying less tax than the taxpayer owes. And, of course, in collateral estoppel analysis, the amount of tax the taxpayer owes was not litigated in the criminal proceeding.

Could the taxpayer make a more subtle argument that at least the tax loss should be preclusive under collateral estoppel as to the amount attributable to fraud for purposes of determining the civil fraud penalty under 26 U.S.C. § 6663? The issue—tax evaded and the portion of the tax attributable to fraud—is the same issue. There are some subtle burden-shifting nuances that, in my opinion, are just not of sufficient weight to forego collateral estoppel on the issue of the portion of the tax attributable to fraud. While I hesitate to get too deeply into the burden of proof rules, I will try to summarize them to introduce them to readers.

At sentencing, the court determines the amount of the tax loss—“the total amount of loss that was the object of the offense.”<sup>177</sup> That is basically the same standard as the civil fraud standard in section 6663.<sup>178</sup> At sen-

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174. 440 U.S. 147 (1979).

175. *Id.* at 153.

176. *See, e.g., Kosinski v. Comm’r*, 541 F.3d 671, 679 (6th Cir. 2008) (rejecting taxpayer’s claim that issue preclusion bound judge in civil proceeding to findings from criminal sentencing proceeding); *Maciel v. Comm’r*, 489 F.3d 1013, 1025 (9th Cir. 2007) (holding issue preclusion presumptively inapplicable to sentencing findings).

177. U.S. SENTENCING GUIDELINES MANUAL § 2T1.1(c)(1) (2013).

178. *See* 26 U.S.C. § 6663 (2012). The courts dealing with the civil fraud penalty do not usually state the standard as the crisp elements in section 7201—affirmative act, tax due and owing, and willfulness. *See* 26 U.S.C. § 7201; *see also* *Cheek v. United States*, 498 U.S. 192, 196 (1991) (describing standard willfulness formulation as “intentional violation of a known legal duty”). Those courts do, however, use words that, in my view, say the same thing. For example, one court stated: “Fraud is the intentional commission of an act or acts for the specific purpose of evading tax believed to be due and owing.” *Eriksen v. Comm’r*, 104 T.C.M. (CCH) 46 (2012). Fraud requires that the taxpayer has “intended to evade taxes known to

tencing, the court determines the tax loss based on a preponderance of the evidence. In the civil case, the court determines civil fraud under a burden-shifting concept as follows: (i) the IRS must prove some portion of the deficiency is due to civil fraud by clear and convincing evidence and (ii) upon meeting that burden, the balance of the underpayment is deemed to be subject to fraud, except to the extent that the taxpayer shows otherwise.<sup>179</sup> Now, the finding of tax loss at sentencing should not be preclusive under collateral estoppel as to the first burden the IRS must meet in the civil case, because the sentencing court determined tax loss by a preponderance of the evidence. In the civil case, the IRS should be required to prove by clear and convincing evidence that some portion of the tax deficiency is attributable to fraud. But, once it has done so, we focus on the burden-shifting in clause (ii).

The key difference is a theoretical one of who has the burden of persuasion as to the portion of the deficiency attributable to fraud. In the sentencing proceeding, the Government had the burden of persuasion to show the tax evaded; in the civil proceeding, the taxpayer has the burden of persuasion to show the part not attributable to fraud. Both burdens are based on a preponderance of the evidence—meaning that the allocation of the burden only affects outcomes where the trier of fact is in equipoise. According to astute observers of trial outcomes, it is not common that triers are in equipoise.<sup>180</sup> Hence, I would argue that the tax loss should be preclusive as to the amount attributable to fraud for purposes of section 6663; the possibility that equipoise could affect the outcome is too inconsequential to justify re-litigating the issue. In short, in the civil case, after the IRS has established by clear and convincing evidence that some portion of the deficiency is attributable to fraud, the portion that is then subject to the civil fraud penalty should be the amount of the sentencing tax loss determined for that year.<sup>181</sup> Readers should be wary, though, that I cannot cite any authority for the reasoning and conclusion that I have just expounded.

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be due and owing by conduct intended to conceal, mislead, or otherwise prevent the collection of taxes, and that there is an underpayment.” *Nelon v. Comm’r*, 73 T.C.M. (CCH) 1843 (1997).

179. See 26 U.S.C. § 6663(b).

180. See *Cigaran v. Heston*, 159 F.3d 355, 357 (8th Cir. 1998) (“The shifting of an evidentiary burden of preponderance is of practical consequence only in the rare event of an evidentiary tie . . . .”); see also *Blodgett v. Comm’r*, 394 F.3d 1030, 1039 (8th Cir. 2004); *Polack v. Comm’r*, 366 F.3d 608, 613 (8th Cir. 2004) (citing *Cigaran*, 159 F.3d at 357); *Knudsen v. Comm’r*, 131 T.C. 185, 188 (2008).

181. Some purists may argue that the dynamics of criminal trials may not really place a focus on determining the tax loss, and that it is potentially subject to manipulation by the parties, if for no other reason than to reach a plea agreement. But I would answer that the standard is the same in both situations, and the possibility that the earlier proceeding may not have reached the right result is not a reason to forego collateral estoppel in the second proceeding.

Finally, a recent case has raised the prospect of another type of estoppel—judicial estoppel—that might apply to sentencing determinations.<sup>182</sup> In that case, the taxpayer (in his role as defendant) and the prosecutors stipulated in a plea agreement that “the total tax liability, including interest and penalties, amounted to \$448,776.13.”<sup>183</sup> It is not clear what role that stipulation played in the sentencing. In any event, in the subsequent refund suit, the court said that the taxpayer was judicially estopped from claiming a lower amount. The court reasoned that the taxpayer had clearly stipulated as to the amount, but cited no authority that such stipulations should be binding outside the proceeding at hand. The court then reasoned:

Moreover if Mirando was allowed to proceed in this action, he would gain an unfair advantage. By pleading guilty to tax evasion and specifically agreeing to a total tax liability of \$448,776.13, Mirando avoided the possibility of a longer sentence and the United States agreed not to prosecute Mirando’s ex-wife or two children. After obtaining this benefit from the United States, Mirando cannot turn around and sue the United States for a refund.

Plaintiff Mirando relies on *United States v. Hammon* for its position that his refund claim is not barred by estoppel. In *Hammon*, the Sixth Circuit held that the defendant was not collaterally or judicially estopped from denying the accuracy of the government’s assessments despite pleading guilty to tax evasion and agreeing to pay \$2.39 million in restitution. However, the present case can be distinguished from *Hammon*. In *Hammon*, the plea agreement only stipulated that the defendant willfully attempted to evade taxes assessed by the government in “the amount of approximately \$2.39 million.” Since the plea agreement was ambiguous as to whether the defendant admitted that the \$2.39 million assessment was correct, the defendant was not estopped from challenging the accuracy of the tax assessment. In contrast, Plaintiff Mirando specifically agreed in his 2007 plea agreement that “beyond a reasonable doubt . . . [a]s of June 29, 2007, the total tax liability, including interest and penalties, amounted to \$448,776.13.” Consequently, *Hammon* is not controlling, and judicial estoppel prevents Mirando from bringing his refund claim.<sup>184</sup>

I wonder whether the IRS would be bound by that stipulation.

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182. See *Mirando v. United States*, No. 1:13-CV-00233, 2013 U.S. Dist. LEXIS 135659 (N.D. Ohio Oct. 8, 2013).

183. *Id.* at \*2.

184. *Id.* at \*8–9 (citations omitted); see also *United States v. Hammon*, 277 F. App’x 560, 565 (6th Cir. 2008).

## V. CONCLUSION

As indicated, tax evaded—the part of unpaid civil liability the taxpayer intended to evade—is at the heart of prosecution and sentencing in federal tax cases. Practitioners must know the nuances of the concept of tax evaded as it plays out in the process. By understanding the role of tax evaded and working the numbers, practitioners can avoid pitfalls and achieve benefits for clients.