



U.S. Department of Justice
Tax Division

271.1

Washington, D.C. 20530

MAR 28 1988

Honorable William W. Wilkins, Jr., Chairman
The United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Attention: David Lombardero

Re: Proposed Revisions to Tax
Portion of Sentencing Guidelines

Dear Judge Wilkins:

The Tax Division of the Department of Justice respectfully submits for your consideration the original and one copy of the attached proposal for revisions to the tax portion of the Sentencing Guidelines. This proposal was developed in conjunction with the Internal Revenue Service, following discussions between Commission staff and representatives of the Tax Division and Internal Revenue Service. I have been authorized to state that both the Criminal Investigation Division of the Internal Revenue Service and the Criminal Tax Division, Office of Chief Counsel, Internal Revenue Service, endorse this proposal.

We greatly appreciate the opportunity to offer our comments on the Sentencing Guidelines, as well as the on-going cooperative efforts of your staff in conferring with us about the tax guidelines. If you have questions regarding the instant proposals, please contact Robert E. Lindsay (633-3011) of my staff.

Sincerely yours,

/s/

WILLIAM S. ROSE, JR.
Assistant Attorney General
Tax Division

Memorandum



Subject **Chapter 2, Part T (Tax)
Sentencing Guidelines
Revision Proposal**

Date

MAR 28 1988

To

United States
Sentencing Commission

From

William S. Rose, Jr. 19
Assistant Attorney General
Tax Division

The Tax Division of the Department of Justice and the Internal Revenue Service (IRS) appreciate the opportunity to comment on the Sentencing Commission's proposal to eliminate the interest provision contained in Sections 2T1.1 and 2T1.6 of the Sentencing Guidelines. While we believe that the imposition of interest on unpaid taxes in calculating tax loss is warranted and constitutes a significant amount, and that interest should be applied for all offenses in the tax portion of the guidelines, we would have no objection to eliminating the interest provision if the following structural adjustments to Part T were adopted:

1. One level across-the-board increase in all offense levels in the existing Tax Table (Appendix A);

2. Where applicable, throughout the tax part, increase of one level in base offense levels where a specific numerical offense level is provided (e.g., 2T1.2(a)(2):5-6; 2T1.3(a)(2):6-7);

3. Revise Tax Table to permit more substantial sentences for cases involving tax losses over \$70,000 and to stretch the existing offense levels from the maximum existing base offense level of 18 to 23;

4. Increase "criminal activity" specific offense adjustment throughout Part T from 2 to 4 levels.

If the interest provisions of 2T1.1 and 2T1.3 are retained, we recommend that such interest be applied to all offenses contained in the income taxes portion of Chapter 2, Part T.

The Tax Table changes outlined above in Items 1 and 3 are reflected in the following proposed Tax Table: 1/

<u>Proposed Tax Loss</u>	<u>Offense Level</u>
\$0 - \$2,000	7
\$2,001 - \$5,000	8
\$5,001 - \$10,000	9
\$10,001 - \$20,000	10
\$20,001 - \$40,000	11
\$40,001 - \$70,000	12
\$70,001 - \$100,000	13
\$100,001 - \$150,000	14
\$150,001 - \$200,000	15
\$200,001 - \$300,000	16
\$300,001 - \$400,000	17
\$400,001 - \$600,000	18
\$600,001 - \$800,000	19
\$800,001 - \$1,000,000	20
\$1,000,001 - \$2,000,000	21
\$2,000,001 - \$5,000,000	22
Greater than \$5,000,000	23

The one-level increase in specific numerical base offense levels requested as Item 2 is a corollary to the one-level, across-the-board increase in cases where the Tax Table is not utilized.

I. TAX TABLE/OFFENSE LEVEL INCREASES:

In our view, the current guidelines and Tax Table could result in shorter sentences than were obtained under pre-sentencing guideline situations. This is contrary to the Commission's stated purpose of increasing punishment in terms of imprisonment in criminal tax cases and in reducing the number of purely probationary sentences. (See Commentary, §2T1.1.)

The elimination of interest provisions, in certain instances, will further diminish a defendant's potential sentencing exposure by reducing the base offense level by one. Based on IRS statistical information for 1987 General Enforcement Program (GEP) cases, assuming a 10% interest rate, 42% of affected cases are increased by one offense level through the inclusion of interest. At 8% interest, 33% of affected cases are increased by one level through the inclusion of interest. The proposed one base offense level increases are designed both to counterbalance any offense level reduction caused by the loss of interest and to promote the goals of increased sentencings in criminal tax cases with reduced

1/ Attached hereto as Appendix B is a composite comparison chart of the existing tax loss amounts; offense levels; sentencing ranges (Criminal History:I); and proposed tax loss amounts.

numbers of purely probationary sentences. Moreover, the proposed level increases are simple to implement and apply, a significant factor when compared to any practical complexities deriving from the inclusion of the interest provision.

Specifically with respect to probationary impact, the across-the-board, one-offense level increases will mean that, assuming criminal history category of I and the two-level acceptance of responsibility adjustment, only criminal tax cases with \$5,000 or less in tax loss could result in pure probationary sentences. Under the present table, using the same assumptions regarding criminal history and acceptance of responsibility, probationary sentences are available in tax evasion cases involving \$10,000 in tax loss.

II. TAX TABLE/TAX LOSS ADJUSTMENTS:

The proposed tax table changes predicated upon tax loss amounts are designed to enhance the possibility that convicted criminal tax defendants do not escape significant terms of imprisonment where their actions contribute to substantial tax losses and to lengthen the range of the tax table to provide more guideline ranges for defendants engaging in tax crimes with the most serious consequences to the Treasury. Thus, under the proposed changes, a defendant convicted of a criminal tax offense resulting in a tax loss totalling between \$70,000 and \$100,000 would receive an offense level of 13, which, assuming no other adjustments and a criminal history of I, would require that at least one year be spent in prison.

The present offense level for a criminal tax offense resulting in a \$100,000 tax loss could result in a mere five months in prison, with the remaining sentence being served in community confinement, even if the maximum sentence for the appropriate level (12) were imposed. This contrasts with the commentary language in Section 2T1.1 regarding an expected significant enhancement in the prison term of 16 months for \$100,000 tax evasions under the old sentencing system and some increases in the average length of prison terms in smaller cases. Where deterrence is a critical element of the tax guidelines and where the "audit lottery" problem in tax enforcement exists already, the spectre of minimal sentences for substantial tax scheme defendants merely increases the odds of a taxpayer deciding to play the audit lottery.

According to statistics supplied by the IRS relating to 1987, convictions in GEP cases at existing level 13 or above totalled only slightly more than 5% of the cases and, if an acceptance of responsibility factor of two levels is subtracted from such cases, then less than 1% of all such cases are at level 13 or above. Moreover, again assuming acceptance of responsibility, 43% of these cases are at levels 6 or below, thus making a prison term optional in such cases (App. C). The proposed changes in the tax

table are designed to lessen the possibility of very limited sentences of imprisonment for substantial tax evaders.

Similarly, based on Tax Division statistics, in tax evasion cases transmitted by the Division for the period July through December 1987, the case levels under the existing guidelines would result in approximately 70% of such cases falling below the threshold level 13 at which a minimum prison term of one year must be served. The proposed change in the guideline tables would set a clear minimum benchmark that one year in jail will be served for a tax evasion of more than \$70,000.

Similarly, the broadening of the tax tables to include additional offense levels through level 23, up from the present level 18, is intended to enhance sentencing terms for the most egregious tax crimes in terms of revenue loss. Thus, to promote deterrence, one engaging in a \$1,000,000 or more tax scheme should confront a substantially greater prison term than the potential 21-27 months for a level 16 offense scheme under the current table. If deterrence is to have any significance in the criminal tax area, the area of the criminal law which impacts each and every one of us, the spectre of lengthier prison terms must be clear in these most egregious cases.

III. INCREASE IN THE "CRIMINAL ACTIVITY" ENHANCEMENT LEVEL:

We also propose to raise the specific offense characteristic increase in Part T of Chapter 2 of the Sentencing Guidelines involving "criminal activity" from two to four levels in all applicable instances. Such an enhancement better serves the purposes of the guidelines to provide more significant prison terms in tax offenses and to promote greater deterrence in this area. Such change also should increase the likelihood that those whose tax offenses are part of a broader pattern of criminal activity face substantial prisons terms.

While the existing enhancement of two levels is based, according to the commentary for Section 2T1.1, on current practice estimates, the general thrust of the tax guidelines is to increase prison sentences for tax offenses to improve deterrence. Thus, an upward adjustment in the present enhancement level is warranted, particularly as underlying criminal conduct generating such income is involved. Moreover, the proposed adjustment is not out of line with the treatment of other similar offenses. The proposal for the increased enhancement level of four in these instances is analogous to, but less than, the five-level enhancement provided in Section 2S1.3(b)(1) for various similar money-laundering offenses, where the defendants knew or believed the funds were "criminally derived."

Thus, it is believed that the proposed adjustments in the enhancement levels from two to four for "criminal activity" in the tax sentencing guidelines is appropriate and warranted to meet the underlying purposes of such guidelines.

IV. OTHER PROPOSED ADJUSTMENTS:

In addition to the above-proposed structural adjustments in the tax guidelines, we propose the following technical adjustments:

A. If interest is retained in the tax guidelines, a provision should be added to stop the running of interest if a payment in the form of a bond is made prior to indictment. This will prevent the anomalous situation of interest accruing on a satisfied underlying tax liability. Section 2T1.1(a)(A) should be changed to read as follows to accomplish this:

* * * (A) [T]he total amount of tax the taxpayer evaded or attempted to evade, including interest to the date of filing of an indictment or information (However, if the taxpayer makes a payment prior to indictment on the potential tax in the form of a bond, the interest for sentencing purposes would cease to accrue on the amount paid as of the date of payment.);

B. In specific offense characteristics regarding "criminal activity" throughout Part T of Chapter 2, the initial clause of such characteristic should read: If (A) defendant failed to report income exceeding \$10,000 in any one year from criminal activity, rather than \$10,000 per year from criminal activity. This will ensure that the "criminal activity" adjustment will apply whenever the activity is present to the extent required within a prosecution period and will not be required throughout the prosecution period. This is in keeping with the intent of the guidelines to increase sentences in tax cases.

C. At 2T1.3(a)(2), to limit the exposure of gamblers if gross income were utilized to compute tax loss, a sentence should be added stating: "If the taxpayer is in the business of accepting wagers, the "tax loss" is 28% of the amount by which taxable income was understated." This will ensure that the tax loss of gamblers will not be computed based upon a percentage of gross income (i.e. bettors' amount at risk), which would involve charging gamblers with amounts at risk on both sides of a wager and create serious distortions of income.

D. Specifically include throughout the income tax guidelines and accompanying commentary the language regarding the aggregation of tax losses in multiple year cases found at 2T1.1. (See 2T1.1(a) and Commentary, paragraph 3.) This comports with the intent of the guidelines' relevant conduct approach and is proposed to avoid any confusion with respect to the aggregation of losses in non-evasion criminal tax cases.

* * * *

Once again, we thank the Commission for the opportunity to present our views.

4. TAX TABLE

§741. Tax Table

	<u>Tax Loss</u>	<u>Offense Level</u>
(A)	less than \$2,000	6
(B)	\$2,000 - \$5,000	7
(C)	\$5,001 - \$10,000	8
(D)	\$10,001 - \$20,000	9
(E)	\$20,001 - \$40,000	10
(F)	\$40,001 - \$80,000	11
(G)	\$80,001 - \$150,000	12
(H)	\$150,001 - \$300,000	13
(I)	\$300,001 - \$500,000	14
(J)	\$500,001 - \$1,000,000	15
(K)	\$1,000,001 - \$2,000,000	16
(L)	\$2,000,001 - \$5,000,000	17
(M)	more than \$5,000,000	18

Tax Table

<u>Tax Loss</u>		<u>Offense Level</u>	<u>Sentencing Range</u> <u>Criminal History: 1</u>	<u>Proposed</u> <u>Tax Loss</u>
(A)	Less than \$2,000	6	0-6	Less than \$2,000
(B)	\$2,001 - \$5,000	7	1-7	\$2,001 - \$5,000
(C)	\$5,001 - \$10,000	8	2-8	\$5,001 - \$10,000
(D)	\$10,001 - \$20,000	9	4-10	\$10,001 - \$20,000
(E)	\$20,001 - \$40,000	10	6-12	\$20,001 - \$40,000
(F)	\$40,001 - \$80,000	11	8-14	\$40,001 - \$80,000
(G)	\$80,001 - \$150,000	12	10-16	\$80,001 - \$150,000
(H)	\$150,001 - \$300,000	13	12-18	\$150,001 - \$300,000
(I)	\$300,001 - \$500,000	14	15-21	\$300,001 - \$500,000
(J)	\$500,001 - \$1,000,000	15	18-24	\$500,001 - \$1,000,000
(K)	\$1,000,001 - \$2,000,000	16	21-27	\$1,000,001 - \$2,000,000
(L)	\$2,000,001 - \$5,000,000	17	24-30	\$2,000,001 - \$5,000,000
(M)	More than \$5,000,000	18	27-33	Greater than \$5,000,000
		19	30-37	
		20	33-41	
		21	37-46	
		22	41-51	
		23	46-57	

CEP FY '87 Convictions That Were Sentenced

ANALYSIS OF FY '87 CEP CONVICTIONS

New Guidelines

Offense Level	Total Cases	Number and Percentage Re Prison	For Those Sentenced Av. Sentence (Months)
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1	0-	--	
4	0-	--	
5	49	19-18	10
6	212	121-57	29

7	38	15-19	
8	102	47-46	14
9	158	78-49	12
10	203	118-58	14
			20

11	63	41-65	16
12	44	25-56	17

13	34	22-64	23
14	11	11-100	31
15	4	4-100	19
16	4	3-75	50
17	2	2-100	27
TOTAL	224	386-55	29

Sentencing Range (Months)	Minimum Sentence Options	Percentage in each Offense Level	If All Tenpayers Accept Responsibility, New Percentage in Offense Levels
0-1	1) Probation	0-	5
0-4	2) Imprisonment	0-	23
0-5	3) Intermittent Imprisonment	5	4
0-6	4) Community Confinement	21	11
1-7	One of the following Equal to the Minimum Within the Range:	4	17
2-8	1) Imprisonment	11	22
4-10	2) Intermittent Imprisonment	17	1
6-12	3) Community Confinement	26	5
8-14	One of the following Equal to the Minimum Within the Range, but With at least 1/2 the Minimum Being Imprisonment:	1	4
10-16	1) Imprisonment	5	1
	2) Intermittent Imprisonment		
	3) Community Confinement		
12-18	1) Imprisonment Equal to the Minimum Within the Range	4	.00
15-21		1	.00
18-24		.04	.02
21-27		.04	.02
24-30		.02	--
		100	

*Assumes Criminal History Category 1