REPORT #562

TAX SECTION

New York State Bar Association

Letter on Application

April 3, 1987

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BYFEDERAL EXPRESS

The United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Attention: Guideline Comments

Gentlemen:

The Tax Section of the New York State Bar Association has approximately 3,000 members actively engaged in the practice of tax law. Through its 100 member Executive Committee and 30 standing committees, it regularly provides comments of a technical nature to various legislative and administrative bodies on matters involving federal and New York local taxation. Although the vast majority of the Tax Section membership deal with problems of a purely civil nature, the Tax Section has committees devoted to the administrative problems associated with civil and criminal penalties and with unreported income. It is also not uncommon for an active tax practitioner from time to time to become involved in the representation of, or advice to, a taxpayer involved with potential or actual prosecution for an alleged violation of the various tax laws.

We realize that the public comment period on the revised draft expired on March 16, 1987 and that the Commission must submit its sentencing guidelines to Congress on or before

April 13, 1987. Our comments, which are directed to those portions of the guidelines pertaining to tax matters, are being submitted with the hope they can be taken into account by the Commission in its final submission.

We endorse the goal of greater consistency in sentencing practices, especially as regards federal tax crimes. We also believe that tax crimes are at least as susceptible to deterrence as other “white collar” crimes by the availability and predictable use of appropriate sanctions, including incarceration as well as monetary penalties. To that extent we endorse the revised draft of the guidelines.

At the outset we note that the revised draft and accompanying report do not deal with a critical issue which must be evaluated in considering the appropriateness of incarceration as a sanction for tax crimes and other white-collar crimes. This unaddressed issue relates to the type of incarceration facilities and the nature of unintended risks to which inmates may be subject by virtue of contact with other inmates. Since the report does not discuss this topic, we do not deal with it further in this letter.

With respect to matters addressed in the report, our principal questions relate to whether the severity of the sanction may have been tied too closely to the amount of tax evaded and the extent to which other extenuating circumstances can be considered.

The revised draft, in general, focuses on traditional offense categories, and assigns a certain point value to the offense. The sentencing judge is then permitted discretion to add or subtract further numerical points based upon other acts committed with the crime. However, the judge can only consider those acts listed specifically in the guidelines as relevant to the specific offense for which sentencing is to be imposed.

The judge further has some discretion to adjust the numerical point total, upwards or downwards, based upon “offender characteristics” including a defendant's criminal history, cooperation with the investigating authorities, and his recognition and acceptance of personal responsibility. After considering these relevant

offender characteristics and making numerical adjustments, the sentencing judge would then use a chart to calculate the sentence based upon the numerical total. As a general rule, the guideline would permit the sentencing judge to substitute non-incarcerative options for imprisonment only where the maximum term of imprisonment on the numerical chart comes out to six months or less. Under these standards, an offense that carries a numerical point count of 11 or more contemplates incarceration even after subtractions to recognize a person with the best criminal history.

Given that background, Part T, as a general rule, establishes a base offense level corresponding with the amount of the tax deficiency. (If the amount of the deficiency is not established, the base offense level is 9.) In the case of an offense which results in a tax deficiency, the tax table (at page 138 of the revised draft) would establish a level of 10 offense where the deficiency is $20,001, or more. Level 11 is attained at $20,001, level 12 at $70,001, and the table continues upward to a level 17 when the deficiency is in excess of $1,000,000.

Based on our experience, it would appear that the Department of Justice normally prosecutes a tax offense only if the deficiency is more than $20,000, and further that, in many cases, the IRS will urge prosecution only if there is a “pattern” of two or three years of substantial omission of income. In practice, this would mean that conviction for a criminal tax evasion would in most cases produce a level of offense which would call for a period of incarceration under the standards set forth in the report.

We question whether the use by the guidelines of a quantitative scale of tax evaded (or attempted to be evaded) should be as signficiant a measure of the severity of the sentence to be imposed as appears to be the recommendation. We question whether in most cases the amount of tax evaded (or sought to be evaded) bears a direct relationship to the nature of egregiousness of the tax evasion conduct and, accordingly, is a truly relevant guide for appropriate sanctions. We therefore question whether the detailed schedule tied to levels of tax evaded (or sought to be evaded) should be made more flexible.

Such a change would recognize that incarceration might well be appropriate for evasions of relatively small amounts of tax in order to act as a deterrent for the type of potential broad-scale evasion which could have a serious adverse effect on the revenues and public perception of compliance. Furthermore, we question whether there should be a significantly lower standard of penalty for filing false statements under penalties of perjury (not tax returns) or the aiding, procuring or counseling or advising tax fraud.

On the other hand, uncoupling of the severity of the penalty and amount of tax evaded would support the ability to preserve room for adjusting sanctions for exceptional circumstance, particularly in the direction of allowing judicial evaluation for leniency in exceptional cases. Further, in considering such adjustments, we believe in appropriate cases the sentencing judge should be permitted to consider additional offender characteristics, not included in the guidelines, that may well require case-by-case judicial discretion: the offender's age, education and vocation skills, mental and emotional conditions, physical conditions (including drug dependence and alcohol abuse), employment record, family ties and responsibilities and community ties.

While suggesting the need to preserve some room for adjusting sanctions for exceptional circumstances, we recognize that such flexibility can be at odds with the goal of consistency. In balancing the factors of flexibility and consistency, we would not oppose an approach that would place on a judge a special intellectual and administrative onus to justify more than a limited adjustment for extenuating consideration, trusting then to judicial integrity to implement the guideline without allowing the exceptions to become the rule.

We also believe that a full assessment of the effects of increased emphasis on incarceration should recognize and accept the collateral effects on the justice process. Since the sentencing guideline generally would not apply to plea agreements, there will be a corollary increase in pressure on an accused to engage in plea negotiations to the extent that administrative practice does not adjust to require a suitably increased (and consistently applied) sanction in the cases of plea

agreement. Similarly, if a trial does result, it should be expected that the accused will make greater efforts to establish whatever factors may be relevant for reducing the severity of the usually expected sanction, with the correspondingly increased burden on judicial time and attention.

To summarize, whether on any objective or absolute scale, incarceration should be the normal sanction for tax evasion involves more than technical expertise in matters of taxation. Without expressing a view on that question, we do think that tax evasion by potential offenders is particularly susceptible of deterrence through application of appropriate sanctions, and that a structure that leads to an expectation of incarceration clearly would have a strong deterrent effect in that respect. Thus, we support both the objective of greater sentencing consistency and the relevance of deterrent effect on other possible offenders in fashioning a sentencing program for tax crimes. However, we question whether those objectives are best achieved by adopting a system that is tied so closely to a detailed schedule of the amounts of tax involved. Further, we believe that relevant extenuating personal factors must be taken into account to reflect an inherently human problem which does not lend itself to ready solutions tied to mechanical schedules.

Respectfully submitted,

Donald Schapiro