About Half of All Tax Convictions Get Sentences Below Guidelines

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By Nathan J. Richman

About half the sentences imposed for tax crimes between 2014 and 2016 fell below the range suggested by the sentencing guidelines, a sentencing commission official said September 16.

Speaking at the Civil and Criminal Tax Penalties session of the American Bar Association Section of Taxation meeting in Austin, Texas, Todd Kostyshak of the U.S. Sentencing Commission said that he pulled data from every pre-sentencing report for the last three years involving federal sentencing guidelines for tax offenses — those involving sections 2T1.1, 2T1.4, and 2T1.6 — as well as for tax cases involving section 2B1.1. He said that under section 2T1.1, 46 percent of sentences following guilty pleas and 52 percent of sentences following convictions at trial resulted in sentences below the range calculated using the sentencing guidelines and without urging by the prosecution. The area with the largest proportion of cases with downward variances is employment tax, with 62 percent of cases resulting in a downward variance, he said.

"From the commission's point of view, that is bad news because that means that the courts think the guidelines aren't working," Kostyshak said.

Kostyshak added that while he had expected to see a so-called trial penalty — with convicted defendants facing worse outcomes than those who plead guilty — the large incidence of downward variances after trial does not bear that out. However, he noted that the tax losses and sentences after trial are still higher.

Michael A. Villa Jr. of Meadows, Collier, Reed, Cousins, Crouch & Ungerman LLP said that the trial penalty does seem to show up through the tax loss because the defense can negotiate the tax loss as part of a plea agreement but not after a conviction at trial. He pointed out that the median tax loss after trial was more than $580,000, while the median tax loss after a guilty plea was about $180,000. The pattern is likely not random but instead evidence of the loss of the ability to negotiate, Villa said, adding that the larger proportion of variances after trial could also be connected to the higher starting points emanating from the higher tax losses.

Courts in the Second Circuit imposed the lowest average sentences, Kostyshak said. The average sentences for tax cases imposed by courts in the Fifth, Eighth, and Eleventh circuits were more than twice as long, he said.

Effects of Sessions Memo?

Megan L. Brackney of Kostelanetz & Fink LLP asked the other panelists whether they have

seen any changes in tax crime prosecutions as a result of Attorney General Jeff Sessions's May 10 memo establishing a policy of charging the most serious readily provable offense.

Villa said that the most obvious application in a tax case would be the hope that a charge could be for a false return under section 7206(1) rather than for evasion under section 7201. However, he said that someone who was an assistant U.S. attorney when the memo was issued told him that the memo is not a major topic of discussion in tax cases. "In practice, we didn't see a real difference in how they are negotiating or which charges they are bringing," he said.

Michelle F. Schwerin of Capes, Sokol, Goodman & Sarachan PC said that she has also not seen much effect from the memo.

Brackney also noted revisions made to the restitution section of the tax resource manual in the U.S. Attorney's Manual that encourage tax prosecutors to insert language describing the defendant's conduct as fraud as well as suggesting that tax restitution payments be made directly to the IRS.

Villa said that the insertion of the word "fraud" into plea agreements could interfere with attempts to avoid the 75 percent civil fraud penalty under section 6663 at later civil assessments for pleas to crimes other than evasion. A conviction for a crime like filing a false return does not necessarily collaterally estop the possibility of a lesser penalty under the case law, but the new language may make those arguments difficult, he said.

CI Updates

At a separate session the same day, new IRS Criminal Investigation division Chief Donald Fort said that CI has hired six new classes of 24 special agents in the last two fiscal years. Five of those classes were filled by external hires and the other involved agency transfers, he said. He pointed out that CI generally loses about 150 special agents each fiscal year.

"Two of the classes are actually at the training academy; the others are out in the field," Fort said. The academy training takes six months, he said.

The Treasury Inspector General for Tax Administration released a report September 18 describing the declining resources at CI and the resulting special agent attrition. The report examines fiscal 2012 through fiscal 2016 and attributes a 34 percent drop in the number of cases initiated over that time frame to the decline in resources. TIGTA made no recommendations.

Asked about CI's contract with Chainalysis Inc., Fort said that CI special agents are experts in analysis of cryptocurrencies as a result of the evolution of identity theft from a street-level crime into an international cybercrime. "Some of our agents are really the world's foremost experts in tracking and working cybercrimes," he said, adding that one of his goals is mandatory cryptocurrency training for all special agents in the near future. Use of cryptocurrencies may be moving beyond money laundering into traditional tax crimes, he said.

Traditional tax cases are those that still require referral to the Justice Department's Tax

Division, Fort said. Under Directive 144, identity theft cases do not require that approval. He said that his primary mission as CI chief is traditional tax cases.

At a luncheon on September 15, Fort provided details about CI's increased use of data, especially as part of the new nationally coordinated investigations unit and dedicated international tax enforcement group. He said that CI is exploring techniques such as predictive policing algorithms. CI has been using the data analysis software Palantir successfully, he said.

"Data analytics don't take the place of the investigations and the investigators," Fort said, although he acknowledged that the use of data does speed cases along and helps connect the dots much more quickly. Further, data analytics will help select the best cases to work, he said.

Fort said he is looking for even more data analysis tools, including those used by other law enforcement agencies and those emerging from work at colleges and universities.