the confidence taxpayers must have in our voluntary compliance tax system that everyone else is paying their fair share of taxes, too.

The problem plaguing the sophisticated conduct enhancement in tax cases, a problem we believe to have worsened in recent years, lies in discriminating conduct which is unexceptional as tax fraud, but which may be thought sophisticated in relation to other offenses. By definition, tax fraud involves "any conduct, the likely effect of which would be to mislead or conceal,"[10] so the offense in its simplest form requires a misguided attention to detail not necessarily seen in other species of criminality; the enhancement is thus properly reserved for situations where there is genuinely complex concealment in an offense ordinarily **involving** a measure of sophistication.

The "subjective determination" language of Application Note 6 in the 1987 version of §2T1.1 ("Whether 'sophisticated means' were employed (§2T1.1(b)(2)) requires a subjective determination similar to that in §2F1.1(b)(2).") confirmed the idea that the "sophistication" was to be evaluated with regard to tax fraud. The 1989 Amendment to Application Note 6, ("Sophisticated means" as used in §2T1.1(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case.") affirmed again that the measure of sophistication was derived from the tax fraud area, and not from the universe of federal criminal misconduct.

Despite the prior commentary, the "sophisticated means" concept suffered from the judicial equivalent of inflation. Pointing to commentary defining "sophisticated" as "either more complex or demonstrates greater intricacy or greater planning than the routine tax evasion case," trial courts applied the former adjustment almost routinely and sometimes to conduct which simply was not sophisticated.[11] While the 1998 reformulation, "especially complex or especially intricate offense conduct" emphasizes that the enhancement punishes complexity or intricacy beyond a presumptive baseline of each, our experience is that the district courts find garden variety tax fraud to qualify. Resort to the Court of Appeals is often uncertain in light of the clear error rule. *See e.g., United States v. Kontny*, Case No. 00-3006 (7th Cir., Jan. 4, 2001) for a discussion culminating in the Court's conclusion that the enhancement applies in the great number of cases today because prosecutors now prosecute cases which exceed the standard for the increase: what the Sentencing Commission figured to be the average level of sophistication for criminal tax fraud at the time the guideline was promulgated in 1987.

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[10] *Spies v. United States*, 317 U.S. 492, 499 (1943).

[11] *See e.g., United States v. Bhagavan*, 116 F.3d 189 (7th Cir. 1997)(instructing office manager to alter client account records to reflect phony discounts or credits and not permitting outside accountant access to records not sufficiently sophisticated); *United States v. Rice*, 52 F.3d 843 (10th Cir. 1995)(claiming false refunds for unpaid withholding taxes); *United States v. Stokes*, 998 F.2d 279 (5th Cir. 1993)(deposit of embezzled funds into fictitiously named accounts and failure to disclose embezzled income to return preparer).

We trace the current situation to the Commission's 1989 effort to deploy an objective standard, coupled with the paucity of criminal tax prosecutions. No federal judge has experience with a sufficient number of criminal tax fraud cases to be able to have comfort with what constitutes an "average" level of sophistication for tax offenses, thus making impossible the task of reliably determining what is "especially complex" or "especially intricate". Lacking that reference point, but striving to use some type of objective standard, federal judges often appear to rely on their concepts of sophistication as assessed in regard to all federal criminal offenses. Thus, in practice, there is currently no difference in application between the sophisticated concealment enhancement under §§ 2T1.1(b)(2) and 2T.1.4(b)(2) and the sophisticated means enhancement under §2F1.1(b)(6)(c).

The practical consequence is that the sophisticated conduct enhancement almost has become automatic in tax fraud cases. Effectively, this automatically increases offense levels in tax fraud cases by two levels. We believe this leads to a number of tax fraud defendants being punished more severely than the Commission intended.

Conforming the verbal formulation of the sophisticated conduct enhancements for tax fraud, on the one hand, and theft and fraud, on the other, will not affect current practice, because the two are already interpreted the same way. However, the formulation we have now is not what we believe the Commission intends in the tax fraud area. We encourage the Commission to emphasize a more selective application of the sophisticated concealment enhancement in tax cases. The base offense levels for tax fraud offenses are already slightly higher than those for a given loss amount than fraud and theft offenses.

With the advent of the 2-point adjustment for Less Serious Economic Crimes under §5A1.2, we believe it is important to address the over-inclusiveness problem now. This new ameliorative adjustment disqualifies persons receiving the sophisticated concealment enhancement under §2T1.1(b)(2). To the extent the sophisticated concealment enhancement is over applied, it frustrates the intent of §5A1.2 for a class of cases to which it rightly ought to apply.