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March 25, 2013

United States Sentencing Commission

Rulemaking Committee

Thurgood Marshall Federal Judiciary Building,

One Columbus Circle,N.E., Suite 2-500

Washington, DC., 20002-8002.

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Re: proposals to amend § 2T1.1

Dear U.S. Sentencing Commission:

I write this letter as a legal practitioner as well as an advocate for fair procedures. The Commission is currently considering three possible alternatives to clarify and define the term "tax loss" for purposes of sentencing in tax crime cases. I urge the Commission to adopt its Proposal no. 1 (clarifying the term to mean net tax losses and thus allowing for an accounting of deductions, payments and offsets).

The Commission asks, in its "Issues For Comment" 1 (C) whether there are *"differences among the various types of tax offenses that would make it appropriate to have different rules on the use of unclaimed deductions? If so, what types of tax offenses warrant different rules, and what should those different rules be?"*

I direct the Commission's attention to a case I am currently involved with in the U.S. 8th Circuit entitled *United States v. McLain*, 646 F.3d 599 (8th Cir. 2011). I was appointed under the Criminal Justice Act to represent the defendant, Francis McLain. The allegations against

McLain were that McLain's company had operated a home-health service in the greater Minneapolis area in which nurses were (allegedly unlawfully) treated as independent contractors rather than employees. McLain was convicted of failure to withhold and pay over taxes relating to the company's nurses.[1] The problem (for purposes of this letter) is that by treating the nurses as independent contractors, McLain's firm had not deprived the Federal government of any tax revenue. (The nurses, treating their pay as gross income, had paid all taxes due through their own returns; and the prosecution stipulated to this).[2]

At McLain's original sentencing, the District Court considered each dollar which McLain's firm had failed to withhold from each nurse's paycheck as "tax losses" for purposes of sentencing. Thus, McLain was sentenced under a guideline level of 20, corresponding to conceptual "tax losses" of over eight hundred thousand dollars, even though these very monies had in fact been collected by the IRS through the workers' individual tax returns.

I regard Francis McLain's four-year prison sentence as a travesty of justice and a disgrace to the rule of law. (Note that the *McLain* litigation over this issue continues.) McLain's conduct (regarding this point) did not deprive the government of a penny of revenue.[3]

I hope this insight helps the Commission make a sound determination regarding this matter.

Thanks for this opportunity,

--Roger I. Roots

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[1] 26 U.S.C. § 7202 provides that "Any person required to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties, ... be guilty of a felony…"

[2] In response to McLain's Motion for Brady material (filings 247 & 248) which would inculpate McLain from owing taxes which had already been paid by the company's workers, the District Court stipulated in its order filed on Aug. 25, 2009 (filing # 251) that for sentencing purposes all the independent nurses and nursing assistants had filed and paid their own taxes. In that same order the District Court wrote that if the government did not object such stipulation would be the law of the case. There was no objection by the government. Therefore, the $826,795.89 was stipulated as being paid by the employees/independent contractors.

[3] The unfairness of McLain's treatment is especially pronounced when considered against other 7202 cases in which defendants were convicted of failing to pay over taxes that were actually withheld by the defendants. Indeed, other 7202 offenders received lower prison sentences for real tax losses than McLain received for unnoticed, unassessed and conceptual tax losses. See *United States v. Carlson*, 498 F.3d 761 (8th Cir. 2007) (8 months home confinement and 5 years probation stemming from real tax loss stipulated at $561,233.76); *United States v. Blanchard*, 618 F.3d 562 (6th Cir. 2010) (22 months stemming from actual loss of $231,024.60); *United States v. Easterday*, 564 F.3d 1004 (9th Cir. 2008) (30 months imprisonment stemming from real tax losses of over $18 million; defendant's companies had withheld over $44 million in payroll taxes, but had only paid over $26 million); *United States v. Thayer*, 201 F.3d 214 (3rd Cir. 1999) (18 months stemming from real tax loss of over $900,000); *United States v. Brennick*, 134 F.3d 10 (1st Cir. 1998) (13 months and $6,000 fine stemming from real tax loss of over $1.5 million); *United States v. Evangelista*, 122 F.3d 112 (2nd Cir. 1997) (46 months over real tax loss of over $1.5 million); *United States v. Gollapudi*, 130 F.3d 66 (3rd Cir. 1997) (24 months stemming from real tax loss of $527,828).