

PROPOSED AMENDMENT: COMPUTING TAX LOSS UNDER §2T1.1

Synopsis of Proposed Amendment: *This proposed amendment addresses a circuit conflict regarding how tax loss under §2T1.1 is computed for offenses that involve both individual and corporate tax returns. Under §2T1.1 tax loss is defined as 28 percent of the amount by which the greater of gross income and taxable income was understated, plus 100 percent of the total amount of any false credits claimed against tax. If the taxpayer is a corporation, 34 percent is used in lieu of 28 percent. Application note 7 to 2T1.1 was added in 1993 to give guidance in cases that involve both individual and corporate tax returns. Pursuant to this application note, in such cases, “the tax loss is the aggregate tax loss from the offenses taken together”.*

§2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

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(c) Special Instructions

For the purposes of this guideline --

- (1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed).

Notes:

(A) If the offense involved filing a tax return in which gross income was underreported, the tax loss shall be treated as equal to 28% of the unreported gross income (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(B) If the offense involved improperly claiming a deduction or an exemption, the tax loss shall be treated as equal to 28% of the amount of the improperly claimed deduction or exemption (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(C) If the offense involved improperly claiming a deduction to provide a basis for tax evasion in the future, the tax loss shall be treated as equal to 28% of the amount of the improperly claimed deduction (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(D) If the offense involves (i) conduct described in paragraphs (A), (B),

and (C); and (ii) both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together.

- (2) If the offense involved failure to file a tax return, the tax loss is the amount of tax that the taxpayer owed and did not pay.

Notes:

(A) If the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income (25% if the taxpayer is a corporation) less any tax withheld or otherwise paid, unless a more accurate determination of the tax loss can be made.

(B) If the offense involves (i) conduct described in paragraph (A), and; and (ii) both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together.

- (3) If the offense involved willful failure to pay tax, the tax loss is the amount of tax that the taxpayer owed and did not pay.
- (4) If the offense involved improperly claiming a refund to which the claimant was not entitled, the tax loss is the amount of the claimed refund to which the claimant was not entitled.
- (5) The tax loss is not reduced by any payment of the tax subsequent to the commission of the offense.

Commentary

Application Notes:

1. *"Tax loss" is defined in subsection (c). The tax loss does not include interest or penalties. Although the definition of tax loss corresponds to what is commonly called the "criminal figures," its amount is to be determined by the same rules applicable in determining any other sentencing factor. In some instances, such as when indirect methods of proof are used, the amount of the tax loss may be uncertain; the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts.*

Notes under subsections (c)(1) and (c)(2) address certain situations in income tax cases in which the tax loss may not be reasonably ascertainable. In these situations, the "presumptions" set forth are to be used unless the government or defense provides sufficient information for a more accurate assessment of the tax loss. In cases involving other types of taxes, the presumptions in the notes under subsections (c)(1) and (c)(2) do not apply.

Example 1: A defendant files a tax return reporting income of \$40,000 when his income was actually \$90,000. Under Note (A) to subsection (c)(1), the tax loss is treated as \$14,000 (\$90,000 of actual gross income minus \$40,000 of reported gross income = \$50,000 x 28%) unless sufficient information is available to make a more accurate assessment of the tax loss.

Example 2: A defendant files a tax return reporting income of \$60,000 when his income was actually \$130,000. In addition, the defendant claims \$10,000 in false tax credits. Under Note (A) to subsection (c)(1), the tax loss is treated as \$29,600 (\$130,000 of actual gross income minus \$60,000 of reported gross income = \$70,000 x 28% = \$19,600, plus \$10,000 of false tax credits) unless sufficient information is available to make a more accurate assessment of the tax loss.

Example 3: A defendant fails to file a tax return for a year in which his salary was \$24,000, and \$2,600 in income tax was withheld by his employer. Under the note to subsection (c)(2), the tax loss is treated as \$2,200 (\$24,000 of gross income x 20% = \$4,800, minus \$2,600 of tax withheld) unless sufficient information is available to make a more accurate assessment of the tax loss.

Example 4: A defendant files an individual tax return reporting income of \$60,000 when his income was actually \$100,000. In addition, the defendant owns a closely-held corporation for which he files a corporate tax return reporting income of \$100,000 when the corporation's income was actually \$140,000. Under Note (A) and (D) to subsection (c)(1), the tax loss is treated as \$24,800 (\$100,000 of actual gross individual income minus \$60,000 of reported gross individual income = \$40,000 x 28% = \$11,200, plus \$140,000 of actual gross corporate income minus \$100,000 of reported gross corporate income = \$40,000 x 34% = \$13,600) unless sufficient information is available to make a more accurate assessment of the tax loss.

In determining the tax loss attributable to the offense, the court should use as many methods set forth in subsection (c) and this commentary as are necessary given the circumstances of the particular case. If none of the methods of determining the tax loss set forth fit the circumstances of the particular case, the court should use any method of determining the tax loss that appears appropriate to reasonably calculate the loss that would have resulted had the offense been successfully completed.

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~~7. If the offense involves both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together.~~

Issue for Comment: *The Commission invites comment on whether §2T1.1 should be amended to provide a sequential method of determining tax loss in cases in which the defendant is both the individual and the corporate tax payer.*