Testimony of

Richard F. Albert

on behalf of the

NEW YORK COUNCIL OF DEFENSE LAWYERS

before the

UNITED STATES SENTENCING COMMISSION

for the hearing on

2013 PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY

Washington, D.C.

March 13, 2013

INTRODUCTION

Judge Saris and Distinguished Members of the United States Sentencing Commission:

Good afternoon, my name is Richard F. Albert. I have been engaged in the private practice of federal criminal defense in New York City since graduating from Harvard Law School in 1989, except for five years serving as a federal prosecutor in the United States Attorneyôs Office for the Southern District of New York, and a year serving as law clerk to the Honorable Kimba M. Wood of the United States District Court for the Southern District of New York. Since 2004, I have been a principal with the firm of Morvillo Abramowitz Grand Iason and Anello P.C. I have been a member of the New York Council of Defense Lawyers since 2005.

On behalf of the NYCDL, I would like to begin by thanking you for the opportunity to address the Commission with respect to some of the important issues under consideration during this amendment cycle. The NYCDL is a professional association comprised of more than 200 experienced attorneys whose principal area of practice is the defense of criminal cases in federal court. We count among our members a former United States Attorney, several former Assistant United States Attorneys, including previous Chiefs of the Criminal Divisions in the Southern and Eastern Districts of New York and current and former attorneys from the Federal Defender offices in those districts. Our members thus have gained familiarity with the Sentencing Guidelines both as prosecutors and as defense lawyers. In my testimony, I will address a number of proposed amendments of interest to our organization.

The NYCDL intends to submit a more extensive submission on or before March 19, 2013 in response to the Commissionôs requests for comments. What follows

addresses the proposed amendment to Guidelines §2T1.1, which you have requested that we focus on today.

Amendment to the Commentary of §2T1.1 to Resolve a Circuit Conflict Regarding Calculating the Tax Loss in a Tax Case

The Commission has asked for comment on a proposed amendment that would resolve a circuit conflict regarding whether, in calculating the tax loss in a criminal tax case, a sentencing court may consider unclaimed deductions that the defendant legitimately could have claimed if he had filed an accurate tax return. Specifically, the Commission has identified three options for resolving the circuit conflict: Option 1 provides that the determination of tax loss shall include credits, deductions, or exemptions to which the defendant was entitled, regardless of whether the defendant claimed them at the time the tax offense was committed; Option 2 provides that the determination of tax loss shall not include credits, deductions, or exemptions unless the defendant was entitled to them and claimed them at the time the tax offense was committed; and Option 3 provides that the determination of tax loss shall not include unclaimed credits, deductions, or exemptions unless the defendant demonstrates entitlement to the same through contemporaneous documentation. The Commission also seeks comment on potential additional requirements for determining that a potential unclaimed deduction is legitimate in the event that the Commission were to adopt Options 1 or 3.

The NYCDL commends the Commission for proposing an amendment to address the confusion that has arisen regarding the propriety of considering unclaimed deductions in determining tax loss. For the reasons stated below, the NYCDL recommends adopting

Option 1. The other related issues upon which the Commission seeks comment are also addressed below.

§ 2T1.1 and the Concept of Tax Loss

§ 2T1.1 states that in cases of ñtax 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).ò[1] The notes further state that tax loss shall be calculated based on a set percentage of the underreported gross income or improperly claimed deductions, exemptions, or credits, ñunless a more accurate determination of tax loss can be made.ò[2]

The concept of ñtax lossò is fundamental to this section of the Guidelines. As the Background commentary to § 2T1.1 states, ña greater tax loss is obviously more harmful to the treasury and more serious than a smaller one with otherwise similar characteristics.ò[3] The NYCDL generally opposes the Sentencing Guidelinesô excessive reliance on mechanical calculations of loss amount in determining advisory sentencing ranges for economic crimes. Because, however, this Guidelines section relies upon the concept of ñtax lossò to assess the gravity of the offense, then tax loss it should be. Categorically refusing to consider deductions that are legitimate and substantiated by relevant evidence, though unclaimed, is not endeavoring to accurately calculate tax loss. Such a rule is illogical and undermines the credibility and usefulness of this section, and by extension, the Guidelines generally. It would also tend to result in unfair sentences, because it would treat fundamentally different cases as equivalent under the Guidelines.

[1] U.S. SENTENCING GUIDELINES MANUAL, §2T1.1(c)(1).
[2] *Id.*, Notes A-C.
[3] *Id.*§2T1.1, *Commentary*, *Background*

A hypothetical example illustrates the issue. Defendant A is employed as a teacher, but he also owns and operates a hot dog stand as a side business. His hot dog stand of course has expenses such as the costs of hot dogs, buns, condiments, as well as wages for an employee who operates the hot dog stand when Defendant A is teaching. Such expenses total $60,000 annually, for which Defendant A keeps detailed records and receipts. Defendant Aôs hot dog stand brings in gross revenue of $100,000 annually. He files his tax returns, but reports only his income from his teaching job, omitting the income (and, of course, the expenses) from his hot dog stand.

Defendant B owns and operates a home construction contracting business, but he also does construction consulting on the side for one large company. His consulting business has no appreciable expenses apart from his contracting business. Defendant Bôs consulting business brings in gross fee revenue of $100,000.00 annually. He files his tax returns, but reports only the income (and expenses) from his contracting business, omitting his consulting income.

A rule that refuses to consider Defendant Aôs clearly applicable deductions for cost of goods sold and wages paid would unjustifiably treat Defendant A and Defendant B the same. Assuming a 30% tax rate, it would calculate the tax loss in both cases as $30,000, even though the actual tax loss in Defendant Aôs case is only $12,000. This is the difference in an offense level of 12 and an offense level of 10, which, assuming no criminal history, is the difference between an advisory Guidelines range (10-16 months, in Zone C) that requires imprisonment and one that does not (6-12 months, in Zone B).[4] There is simply no sound basis for treating these two cases the same way, nor is there a

[4] *See* §2T4.1 (Tax Table), and §5C1.1 (Imposition of a Term of Imprisonment).

sound basis for considering $30,000 to be the tax loss in Defendant Aôs case. Doing so overstates the severity of his crime.

Taking into account legitimate but unclaimed deductions likewise furthers § 2T1.1ôs basic goal of better approximating actual loss to the treasury, which is manifest elsewhere in the Notes to § 2T1.1. For example, the Notes provide that unless a more accurate determination of tax loss can be made, a presumptive 28% tax rate is to be applied to gross income in underreporting cases, versus a presumptive 20% rate that is to be applied in failure to file cases. *Compare* § 2T1.1 (c)(1) Note (A) *with* § 2T1.1 (c)(2) Note (B).[5] Presumably, this differential in rate is designed as a rough substitute for the impact of common deductions, credits and exemptions ï like the standard deduction -- in reducing the amount of tax due in the average non-filing case. That is, the difference in rate is an effort to better approximate the actual tax loss to the treasury.[6]

A review of the Court of Appeals decisions addressing the calculation of tax loss under § 2T1.1 reveals that although some courts purport to apply a rule against considering unclaimed deductions, the results in many cases actually appear to turn upon the weakness of the evidentiary support for the deductions. That is, the real issue is the legitimacy of the deductions being asserted. Indeed, even Court of Appeals decisions applying the rule that unclaimed deductions are to be considered in calculating tax loss

[5] The rates referenced are those applicable to individuals; the corresponding rates are 34% and 25% for corporations.

[6] We note that there is a split in the circuit court decisions regarding whether or not the history of the changes in § 2T1.1 over the years supports the consideration of unclaimed deductions in computing tax loss. Because the Commission intends to eliminate any ambiguity through the proposed amendment, we do not address this debate in detail. Nevertheless, consistent with the views of the Second and Tenth Circuits, NYCDL believes that the evolution from the pre-1993 Guidelinesô ñrough and readyò computation that relies more heavily on the application of standard taxation rate to gross income, to the current version that directs the court to substitute a ñmore accurate determination of the tax lossò when such determination can be made, is intended to permit consideration of legitimate, though unclaimed, deductions.

have found that, in the particular circumstances presented, the deductions were properly rejected because the supporting evidence was insufficient.[7]

We submit that Option 1, directing district courts calculating tax loss to consider legitimate unclaimed deductions, while leaving them the discretion to accept or reject such unclaimed deductions depending on the evidentiary support and other particular circumstances of the individual case, is the fairest approach, the approach most consistent with the fundamental thrust of this Guidelines section, and the approach most consistent with actual practice.

The Second and Tenth Circuit Approach

The first option contemplated by the Commission, and recommended by the NYCDL, is consistent with the approach adopted by both the Second and Tenth Circuits. As the Second Circuit has observed ñ[t]ax loss under §2T1.1 is intended to reflect the revenue loss to the government from the defendantôs behavior.ò[8] To make the most accurate determination of the revenue loss to the government, as directed in the notes to §2T1.1, the defendant must necessarily be given ñóthe benefit of legitimate but unclaimed deductions.ôò[9] The court has made clear, however, that the defendant ñbears the full burden of proof in establishing the appropriateness of consideration of . . . unclaimed deductions[s].ò[10] Thus, the Second Circuit in *United States v. Gordon,* while stating that the district court erred in failing to consider potential unclaimed deductions, found such error harmless because Gordon did not offer any proof that his corporation would have

[7] *United States v. Hoskins,* 654 F.3d 1086, 1096-99 (10th Cir. 2011); *United States v. Gordon*, 291 F.3d 181, 188 (2d Cir. 2002).
[8] *Gordon*, 291 F.3d at 187.
[9] *Id.* (quoting *United States v. Martinez-Rios*, 143 F.3d 662, 671 (2d Cir. 1998).
[10] *Id.* (holding that the defendant did not provide any evidence trending to proved his unclaimed deductions).

treated sums it transferred to Gordon as deductible salary expense rather than non-deductible dividends.[11]

Similarly, in *United States v. Hoskins*, the Tenth Circuit explained that ñthe Guidelines establish a simple-to-calculate presumptive tax loss linked to gross income and a set tax rate; this presumptive amount will be applied unless a more accurate determination can be made by the court.ò[12] This does not mean, however, that the Guidelines require ñcourts to base their sentencing analysis on unadjusted gross receipts figures untethered to actual taxes to which the government was entitled, but did not receive as a result of tax evasion.ò[13] Rather a defendant may present evidence to establish ñthat, given his tax-filing practices, he would have claimed deductions on the unreported income; and of course, the government could counter by raising doubts. But these are evidentiary inquiries, and nothing in the Guidelines prevents courts from entertaining arguments on both sides.ò[14] ñ[W]here a defendant offers convincing proof ï where the courtôs exercise is neither nebulous nor complexð nothing in the Guidelines *prohibits* a sentencing court from considering evidence of unclaimed deductions in analyzing a defendantôs estimate of the tax loss suffered by the government.ò[15] Ultimately, however, the *Hoskins* court credited evidence presented by the government resulting in an upward tax loss calculation, and declined to give the defendant the benefit of unclaimed deductions because the defendant ñgave the court no good reason to retroactively credit other unclaimed deductions.ò[16]

---

[11] *Id.* at 187-88.
[12] 654 F.3d at 1092.
[13] *Id.* at 1096-97.
[14] *Id.* at 1097.
[15] *Id.* at 1094.
[16] *Id.* at 1096-99 (defendant used a two month period from 2008 to project deductions she would have been permitted to take in 2002, but the court found that there was no relation between these two periods, there

The Contrary Approach

The second option contemplated by the Commission reflects what appears to be the opposite position regarding unclaimed deductions taken by the Fourth, Fifth, Seventh, Eighth, Ninth and Eleventh Circuits. A closer examination of the pertinent decisions reveals that in practice, however, the approach of these circuits often does not so starkly differ from the evidence-based analysis followed by the Second and Tenth Circuits.

The primary rationale for the rule against considering unclaimed deductions is set forth in the Seventh Circuitôs decision in *United States v. Chavin*.[17] There the court held that ñ[t]he guidelines state that ótax loss is the total amount of loss that was the object of the offense.ô [U.S.S.G.] at §2T1.1(c)(1). We take the phrase óthe object of the offenseôto mean that the *attempted* or *intended* loss, rather than the actual loss to the government, is the proper basis of the tax-loss figure.ò[18] The court then held that ñunclaimed deductions should not be taken into account because they have no relevance to the amount of loss that the scheme attempted to produceò as revealed by the statements the defendant made in the tax returns he actually filed.[19] This reasoning is flawed.

First, as the Tenth Circuit pointed out in *Hoskins*, ñ[e]ven if we accept that §2T1.1 is directed at intended tax loss, it does not follow that in proposing a more accurate determination, a defendant may never benefit from deductions that he could have claimed on the false return.ò[20] The court used a hypothetical to illustrate this point:

---

was no evidence the two month period was chosen at random, and there was no evidence specifically related to unclaimed 2002 deductions that were unclaimed).

[17] 316 F. 3d 666, 677 (7th Cir. 2002). Cited by *United States v. Delfino*, 510 F.3d 468, 472-73 (4th Cir. 2007); *United States v. Clarke*, 562 F.3d 1158, 1164-65 (11th Cir. 2009); *United States v. Blevins*, 542 F.3d 1200, 1202-03 (8th Cir. 2008); *United States v. Phelps*, 478 F.3d 680, 682 (5th Cir. 2007); *United States v. Sherman*, 372 Fed. Appx. 668, (8th Cir. 2010).

[18] *Chavin*, 316 F.3d at 677 (emphasis in original).

[19] *Id.*

[20] Hoskins, 654 F.3d at 1094.

> Assume a restaurant owner is convicted of criminal tax evasion for failing to report or pay taxes on $100,000 income earned from his cash-only business. Let us also assume the restaurant paid $80,000 in tax-deductible business expenses, all in cash. And finally, let us assume the restaurant owner, despite evading his tax-filing responsibilities, maintained immaculate business records documenting every business expense. Assuming a 30% tax rate, if a court refused to consider the deductions under §2T1.1, the restaurant owner would have caused a $30,000 tax loss. If the court did consider the deductions, the governmentôs tax loss would have been only $6,000. We then ask, which of these two tax losses did the defendant *intend*?
>
> The most logical conclusion is that the defendant sought to avoid paying what he legally owed in taxes: $6,000. It would never have occurred to the hypothetical defendant or his accountant that he would be cheating the government out of $30,000.[21]

This point is bolstered by the observation that even courts that rely upon the rule announced in *Chavin* often look to the evidence of potential deductions presented to determine the losses a defendant intended. One such example comes from a more recent Seventh Circuit decision. In *United States v. Psihos*, the defendant was the owner of three restaurants. For one of those restaurants, as to which he underreported income on his tax returns, he maintained two sets of books. At sentencing, Psihos attacked the governmentôs tax loss computation for ignoring ñnumerous deductible expensesò including amounts paid to DJ/promoters; amounts paid in cash wages; costs for complimentary drinks and food; and payments and transfers made to two other restaurants owned by the defendant.[22]

The court, relying on *Chavin* held that the defendantôs claims of deductible expenses were ñirrelevant in determining the tax loss caused by his fraudulent statementsò on his tax returns.[23] However, the court also acknowledged that ñ[t]he

[21] *Id.* at 1095.
[22] 683 F.3d 777, 780 (7th Cir. 2012).
[23] *Id.* at 781.

district court gave [the defendant] credit for the cash payouts listed on envelopes ï as had the government in its loss calculation ï but rejected his remaining claimed deductions.ò[24] The court held that ñeven if we were to follow the reasoning of *Hoskins*, [the defendant] would not benefit because, as the district court concluded, there was an utter lack of support for [the defendantôs] claimed cash payments.ò[25]

Psihos thus illustrates that, in practice, even in circuits that purport to apply a categorical rule against considering unclaimed deductions, the logical pull of doing so when calculating ñtax lossò is hard to resist. The rule that such courts often actually apply is to accept unclaimed deductions when they are legitimate and proven, and to reject such deductions when they are speculative and unproven. In the experience of NYCDL members, this fair and logical approach is consistent with the prevailing actual practice among government investigators, prosecutors, defense counsel and district courts in computing tax loss.

Thus in *United States v. Yip*, the Ninth Circuit also stated that it was following the *Chavin* rule against considering unclaimed deductions, but then likewise examined the facts to determine whether the unclaimed deduction at issue was legitimate.[26] In *Yip* the defendant challenged the district courtôs calculation of tax loss because it included unpaid state taxes in the calculation, but did not allow the defendant to reduce his federal tax loss by deducting the unpaid state taxes.[27] The court found that the defendant could not ñeven

[24] *Id.* at 780.
[25] *Psihos*, 683 F.3d at 781.
[26] 592 F.3d 1035, 1041 (9th Cir. 2010).
[27] *Id.* at 1036-37, and 1040.

argue that the state taxes are legitimate, but unclaimed, deductions. The state taxes are not legitimate deductions because *he did not pay them.*ò[28]

To the same effect, in *United States v. Clarke*, the Eleventh Circuit rejected a lower tax loss that would have resulted if the defendant used the filing status ñmarried filing jointlyò instead of ñmarried filing separatelyò; there was no evidence cited that the defendant ever had or would have claimed ñmarried filing jointlyò status, and there are other obvious factors that would induce a taxpayer to choose one status or the other.[29] Similarly, in *United States v. Blevins*[30], the Eighth Circuit, while declining to decide whether unclaimed deductions can ever offset tax loss, rejected inclusion of asserted deductions that could only be claimed by the taxpayers, not the defendant tax preparer, might still be claimed by the taxpayers in the future (potentially resulting in further lost revenue to the government), and rested upon questionable assumptions not supported by the record.[31]

In sum, to categorically reject the consideration of unclaimed deductions substitutes expedience for fairness and is directly at odds with the determination that this section of the Guidelines requires be made ï the amount of tax loss. Such a rule would create a windfall for the government and treat individuals who have caused disparate harm as equals under the Guidelines. Because categorically disallowing unclaimed

---

[28] *Id.* at 1041.
[29] 562 F.3d at 1164.
[30] 542 F.3d at 1203 & n. 3.
[31] *But compare United States v. Delfino*, 510 F.3d 468, 473 (4th Cir. 2007), where the Fourth Circuit applied a categorical approach rejecting consideration of deductions potentially applicable to defendants, owners of computer consulting businesses, who failed to file tax returns for eleven years. The court held that to allow otherwise, would force the court ñto speculate as to what deductions [the defendants] would have claimed and what deductions would have been allowed.ò The absence of any discussion of the evidence regarding any potential deductions prevents much further analysis, but the decisionôs language makes it appear to be one of the few true examples of the categorical, and we submit incorrect, approach to unclaimed deductions.

deductions in calculating tax loss leads to unfair results, and because government investigators, prosecutors, defense counsel and most sentencing courts consider the underlying facts and evidence when a defendant has sought the benefit of unclaimed deductions, the Commission should clarify that courts should consider unclaimed deductions where they are legitimate and supported by the evidence.[32] Accordingly, the NYCDL strongly urges the Commission to select Option 1.

Potential Restrictions on Considering Unclaimed Deductions

While the Commission presents Option 3 as distinct from Option 1, Option 3 simply adds a particular evidentiary requirement that must be met for unclaimed deductions, specifically: the defendant must demonstrate ñby contemporaneous documentation that the defendant was entitled to the credit, deduction, or exemption.ò In keeping with its past comments to the Sentencing Commission on proposed Guidelines amendments, the NYCDL believes that the sentencing court should be allowed to consider all relevant evidence and circumstances in determining the applicable loss amount. Because the sentencing judge is in a unique position to assess the evidence and calculate loss based on that evidence, and because every case is different, we recommend that Option 1 be adopted without any additional requirements on the court for accepting or denying a defendantôs unclaimed deductions.

Specifically with regard to Option 3, a bright-line, mechanical rule requiring contemporaneous documentation in order to consider unclaimed deductions is an unnecessary restriction on fact-finding, a process in which district judges engage on a daily basis. It also poses a real risk of unfairness in cases where other evidence ï such as a clear track record of claiming certain specific, identified deductions in other tax years --

32

might well convince the sentencing court that the unclaimed deductions are legitimate for the year or activity in question.

Issue for Comment 1(A): Requiring Proof that the Deduction Would Have Been Claimed; Objective or Subjective Standard

The Commission has asked for comment on whether a legitimate but unclaimed deduction should be counted only if the defendant establishes that the deduction would have been claimed if an accurate return had been filed, and if so, whether an objective or subjective standard should be used in determining whether a deduction would have been claimed. The NYCDL recommends that there should be no requirement that the defendant demonstrate that he would have claimed the deduction if an accurate return had been filed, but that if the Commission disagrees and imposes such requirement, courts should be permitted to apply either an objective or subjective standard in making that determination, depending on the specific circumstances presented.

We agree with the observation of the Tenth Circuit in *Hoskins* that ñit is somewhat odd to frame the §2T1.1 analysis in terms of intended tax loss ï when in reality, a tax-evading individual seeks only to avoid paying taxes, not cause any specific loss to the government.ò[33] Put another way, in the ordinary case, it seems a fiction to assume that the defendant sought to avoid paying anything other than the taxes he owed. Accordingly, it does not make sense to impose a requirement that the defendant demonstrate that he would have claimed the deduction in order for it to be taken into account.

As pointed out in *Hoskins*, this conclusion is bolstered by § 2T1.1 (c)(2), which states the general rule for computing tax loss in failure to file cases: ñIf the offense

[33] *See* 654 F.3d at 1095.

involved failure to file a tax return, the tax loss is the amount that the taxpayer owed but did not pay.ò[34] The notion of determining what the defendant ñowedò without regard to legitimate deductions to which he was entitled makes little sense. To maintain consistency with § 2T1.1ôs basic focus on the amount of tax loss as a measure of harm, and to avoid disparate treatment between underreporting cases and failure to file cases, the NYCDL believes that there should be no requirement that a defendant prove that he would have claimed the deduction for it to be taken into account. A sentencing court would retain discretion, of course, to find that in the specific circumstances of a particular case, a deduction that it finds the defendant would not have claimed is not legitimate and thus should not be included in the computation.

This view also finds support in the substantive criminal tax law. In *Boulware v. United States*, 552 U.S. 421 (2008), the Supreme Court specifically addressed the question whether, in a criminal tax prosecution, a defendant is to provide evidence of a contemporaneous intent to treat a distribution as a return of capital (which would not be taxable) rather than a dividend in order to defend a criminal tax prosecution by demonstrating that no tax was actually owed. Relying in part on the substantive tax lawôs focus on ñôthe objective economic realities of a transaction rather than . . . the particular form the parties employed,ôõ[35] the Court held that ña defendant in a criminal tax case does not need to show a contemporaneous intent to treat diversions as returns of capitalò in order to rely on the tax codeôs treatment thereof ñto demonstrate no taxes are owed.ò[36]

---

[34] *See Id.* (citing U.S. SENTENCING GUIDELINES MANUAL, §2T.1.1(Note 2))
[35] *Id*. at 429, *quoting Frank Lyon Co. v. United States,* 435 U.S. 561, 573 (1978)
[36] *Id.* at 439. Further, the substantive criminal tax law requires proof of ôthe existence of a tax deficiencyòô in order for there to be a tax evasion. *Id.* at 424, *quoting Sansone v. United States*, 380 U.S. 343, 351 (1965). It would anomalous to permit a defendant to defend such a claim at trial by demonstrating the existence of a legitimate deduction without requiring proof of a contemporaneous intent to claim it, but the to disregard such deduction to disallow such proof in determining tax loss for sentencing purposes.

If, contrary to our view, the Commission were to impose a requirement that the defendant establish that the deduction would have been claimed had he filed an accurate return, it is the view of the NYCDL that the sentencing court should be permitted to use either an objective or subjective standard, as the court determines to be appropriate in the circumstances of the case. For example, in the hypothetical set forth above, a court could properly determine that any reasonable person in the position of Defendant A would deduct obvious expenses such as cost of goods sold and wages from his hot dog stand business. Even if Defendant A did not have specific records of such expenses, the court could reasonably accept proffered evidence of the costs of such goods and the wages of his employee, without specific evidence regarding the particular defendantôs history of claiming such deductions or inclination to claim them.

In other instances a sentencing court might reasonably and properly choose to use a subjective standard in determining whether legitimate but unclaimed deductions should be allowed. For example, a court could find evidence that a defendant had a track record of claiming certain specific deductions on his tax returns in other tax years, combined with evidence that the defendantôs economic activity during the tax year of conviction was sufficiently similar to such other tax years, as sufficient to support a finding that this defendant would have claimed such legitimate deductions and they should be included in the tax loss computation.

In short, if the Commission should choose to impose a requirement that the defendant prove that a deduction would have been claimed, we see no reason to tie the hands of district judges by restricting them to a particular standard in making that determination. The trial court should be free to consider all relevant circumstances.

Issue for Comment 1(B): Requiring that Deduction be Related to the Offense

For essentially the same reasons as those stated above regarding Issue for Comment 1(A), the NYCDL does not believe that the Commission should impose a requirement that a deduction be related to the offense in order for it to be considered. To give the sentencing court proper latitude to take all relevant circumstances into account, and to maintain consistency with § 2T1.1ôs basic focus on the amount of tax loss as a measure of harm to the public fisc, the NYCDL believes that there should be no specific requirement that the unclaimed deduction be related to the offense. A sentencing court would retain discretion to find that in the specific circumstances of a particular case, an unrelated deduction is not legitimate and thus should not be included in the computation.

Issue for Comment 1(C): Are there Differences Among the Various Types of Tax Offenses that Would Make it Appropriate to Have Different Rules on the Use of Unclaimed Deductions?

The NYCDL believes that it would not be useful or appropriate to have different rules on the use of unclaimed deductions for different types of tax offenses. While the example referenced by the Commission, a restaurant owner who keeps two sets of books, is a circumstance where it may be likely that a court would find that unclaimed deductions are legitimate and proven, it is just one example. There are countless other potential circumstances where a sentencing court could make a similar finding. Consistent with our views regarding Option 3 and our general view that the sentencing judge is best situated to evaluate the specific circumstances of each case, the NYCDL believes that assessing the legitimacy of an unclaimed deduction is the only guidepost needed, and that courts should not be restricted to any specific category of cases in which they may take unclaimed deductions into account.

Issue for Comment 2: Does the reference to ñCredits, Deductions or Exemptionsò Provide Sufficient Clarity as to what Potential Offsets the Court May Consider?

The dispute in the *Psihos* case referenced by the Commission in Issue for Comment 2 regarding whether sums at issue constituted an above-the-line deduction or a below-the-line deduction arose because the defendant was trying to avoid the harsh categorical rule disallowing consideration of any unclaimed deductions. If the Commission adopts Option 1, as the NYCDL recommends, it appears that similar disputes are unlikely to occur in the future. Nevertheless, to provide further clarity on this issue, the NYCDL believes that there would be some benefit for the language of the amendment to be broadened to reference ñcredits, deductions, exemptions *or other legitimate offsets*.ò This would make clear that offsets such as losses, which are not technically considered credits, deductions or exemptions under the tax law, may be considered in computing tax loss.

CONCLUSION

Again, on behalf of the NYCDL, I wish to thank Chairman Saris and the Members of the Commission, and I look forward to any questions the Commission may have.

ND: 4848-9208-7059, v. 1