

## TAX LITIGATION ISSUES

## Expert Analysis

# Tax Defendants Reaping The Benefit of ‘Booker’

**S**entencing in federal criminal cases is governed by the Sentencing Guidelines, which prescribe sentences for different offenses based on factors such as the quantity of drugs involved in narcotics cases or the financial loss caused by defendants charged with economic crimes. In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the mandatory application of the Sentencing Guidelines was unconstitutional and directed sentencing courts to consider the factors identified in 18 U.S.C. §3553(a) in fashioning an appropriate sentence for each defendant. As a result, in addition to the Guidelines, sentencing courts are now required to consider the specific offense conduct, the defendant’s background and unique characteristics, general and specific deterrence, and sentencing parity.

Five years ago, this column considered the impact of *Booker* on sentencing in federal tax cases, noting that data released by the U.S. Sentencing Commission reflected a trend

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toward below-Guidelines sentences. See Jeremy H. Temkin, “Below-Guidelines Sentences for Tax Defendants,” NYLJ (Sept. 15, 2015). In the past five years, that trend has continued, and judges have become increasingly likely to exercise their discretion under *Booker* to sentence defendants convicted of tax offenses below the applicable Guidelines. However, notwithstanding this increased leniency in relation to the Guidelines, defendants sentenced during fiscal 2019 were more likely to receive some period of incarceration (and the period of incarceration imposed was likely to be longer) than tax offenders sentenced before *Booker* as well as those sentenced five years ago.

### Sentencing Data for Tax Defendants

Each year, the Sentencing Commission releases data regarding all sentences imposed in federal

courts across the country. The data is broken down by the crime charged, the district court and Judicial Circuit in which the prosecution took place and the race, gender, and citizenship of the defendants sentenced. The Sentencing Commission also provides the number of cases prosecuted by the primary offense charged; how many defendants were sentenced within, above or below the Guidelines; whether

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Notwithstanding this increased leniency in relation to the Guidelines, defendants sentenced during fiscal 2019 were more likely to receive some period of incarceration (and the period of incarceration imposed was likely to be longer) than tax offenders sentenced before *Booker* as well as those sentenced five years ago.

sentences outside the Guidelines range were the result of a “departure” from the applicable Guidelines or a “variance” based on *Booker*; the mean (average) and median sentences imposed; and the extent of

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any increase or decrease from the Guidelines range.

Between Oct. 1, 2003 and the Supreme Court's June 24, 2004 decision in *Blakely v. Washington*, 542 U.S. 296 (2004), which struck down Washington state's Guidelines regime and served as a precursor to *Booker*, 63.9% of defendants convicted of tax charges received some period of incarceration, with an average sentence for all defendants of 13.2 months and a median sentence of 10.0 months. The Sentencing Commission's data compares the sentences imposed on 349 defendants convicted in tax cases to the Guidelines: 242 (69.3%) were sentenced within the Guidelines range; 103 (29.5%) were sentenced below the Guidelines; and four (1.1%) were sentenced above the applicable Guidelines.

Prior to *Booker*, the only way a defendant could get a below-Guidelines sentence was through the district court's limited authority to grant downward departures. The Sentencing Commission analyzed the explanations that district judges gave for 91 of the 103 below-Guidelines sentences and determined that 50 (55.5%) were based on government motions pursuant to §5K1.1 of the Guidelines (in recognition of the defendant's cooperation), while the remaining 41 were based on other reasons (including five that were sponsored by the government for reasons other than the defendant's cooperation). According to the Commission, for the period leading up to *Blakely*, the median reduction for defendants receiving 5K1.1 departures was 12 months and the median sentence

imposed on those defendants did not include any period of incarceration. By contrast, the median decrease for the defendants who received government sponsored departures not based on cooperation was 11 months and resulted in a median sentence of 5 months in prison, while the median reduction for defendants who received departures without the government's support was 10 months and yielded a median sentence that did not include incarceration.

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It is tempting to attribute the frequency of non-Guidelines sentences and the extent of the reduction in tax cases to a bias in favor of white-collar offenders. The data, however, does not bear that out, and defendants convicted of tax offenses are more likely to receive below-Guidelines sentences and avoid jail than other white-collar offenders.

Ten years later, a lower percentage of defendants convicted of tax offenses received some period of incarceration and their sentences were both substantially more likely to be below the applicable Guidelines range and slightly shorter than their pre-*Blakely* counterparts. Thus, for the fiscal year ending Sept/ 30, 2014, less than 60% (367 of 639) of defendants convicted of tax offenses were sentenced to some prison time with the average and median sentences being 13 and 9 months, respectively. The Sentencing Commission compared the sentences imposed to the

Guidelines ranges for 648 defendants convicted of tax offenses, 198 (30.6%) of whom were sentenced within the Guidelines range, 445 (68.6%) below the Guidelines, and five (0.8%) above the Guidelines.

The vast majority of the 445 below-Guidelines sentences (247 or 55.5%) were predicated on *Booker*, with another 85 (19.1%) resulting from 5K1.1 departures and some other reason being given for remaining 113 (25.4%). Consistent with the pre-*Blakely* data, defendants who received departures based on their cooperation, saw the largest drop in their sentence, with a median reduction of 15 months, while defendants who received variances under *Booker* received a median reduction of 12 months. In both categories, however, the median sentence did not include a period of incarceration.

Last year, while a greater percentage of defendants convicted of tax offenses were sentenced below the applicable Guidelines range, fewer were able to avoid any incarceration and the sentences were longer than they were pre-*Booker*. Thus, in fiscal 2019, the percentage of defendants convicted of tax offenses who received some period of incarceration reverted to 64.2% (351 of 547 defendants) and the average and median sentences rose to 16 months and 12 months, respectively. Significantly, however, 399 (72.9%) of these defendants were sentenced below the Guidelines, while only 148 (27%) were sentenced within the Guidelines range, and nine (1.6%) were sentenced above the Guidelines.

Moreover, judges increasingly relied on *Booker* to extend leniency. Of the 399 defendants sentenced below the applicable Guidelines range during fiscal 2019, 314 (78.6%) received downward variances pursuant to *Booker*, while 69 (17.2%) received downward departures based on §5K1.1, and 16 (4%) received downward departures for some other reason. Defendants who cooperated with the government continued to reap the greatest benefit. While the median reduction for all three groups of defendants was 12 months, the median sentence imposed on cooperators was six months, defendants who benefited from variances under *Booker* received a median sentence of eight months, and the median sentence for defendants who received downward departures not based on cooperation was nine months.

### Comparing Non-Tax Defendants

It is tempting to attribute the frequency of non-Guidelines sentences and the extent of the reduction in tax cases to a bias in favor of white-collar offenders. The data, however, does not bear that out, and defendants convicted of tax offenses are more likely to receive below-Guidelines sentences and avoid jail than other white-collar offenders. Thus, 74.1% (4,738) of the 6,390 defendants sentenced in fraud, theft, and embezzlement cases in fiscal 2019 received a term of imprisonment as part of their sentence, with an average sentence of 21 months and a median sentence of 12 months. Moreover, less than half of the 6,273 defendants sentenced in such cases received below-Guideline

sentences, with 2,061 (66.2%) of the 3,113 defendants sentenced below their applicable Guidelines ranges receiving downward variances pursuant to *Booker*, 830 (26.6%) receiving 5K1.1 departures, and 205 (6.5%) receiving departures on some other grounds.

Again, defendants who received 5K1.1 departures fared the best, with the median decrease being 19 months, compared with defendants who received variances under *Booker* who saw their sentences reduced by a median of 10 months and defendants who received downward departures not based on cooperation whose median reduction was 11 months. The median sentence imposed on all three categories of defendants who received below-Guidelines sentences was 12 months.

### 'Booker' in Action

The cold data set forth above has real life implications. For example, in *United States v. Taffaro*, 919 F.3d 947 (5th Cir. 2019), a defendant was convicted at trial of six counts of tax evasion, five counts of filing false income tax returns and one count of failing to file a return. As part of his scheme, the defendant had claimed "brazenly false business expenses" on his returns. While the Probation Department computed the applicable Guidelines range as 27-33 months in prison, the sentencing judge focused on Taffaro's age, physical condition, family responsibilities, charitable activity, work as a law enforcement officer, and voluntary service in the military during the Vietnam era and imposed a sentence of 60 months of probation. The Fifth

Circuit rejected the government's appeal concluding that the district court had not abused its discretion in showing the defendant leniency.

### Conclusion

Sentencing advocacy has always been an important aspect of any case, but especially in tax cases where defense counsel can have a real impact on the length of the sentence imposed on their clients. Over the years, the Guidelines in tax cases have become increasing harsh and, absent the discretion afforded by *Booker*, defendants would be facing even longer sentences. The observed shift by sentencing courts towards using the flexibility afforded by *Booker* to impose below-Guidelines sentences in tax cases suggests that defense counsel representing non-cooperating defendants have successfully focused their sentencing presentations on the factors identified in §3553(a), and that their clients have reaped substantial benefits of their efforts.