

## TAX LITIGATION ISSUES

BY JOHN J. TIGUE JR. AND JEREMY H. TEMKIN

### *Sentencing in Criminal Tax Cases Post-'Booker'*

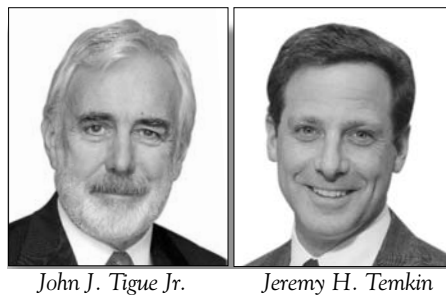
The U.S. Supreme Court's 2005 decision in *United States v. Booker* rendered the U.S. Sentencing Commission Guidelines advisory, re-turning greater discretion to district judges to achieve reasonable sentences.

Sixteen months later, sufficient data has been collected to provide practitioners with an initial sense of the decision's impact. Post-*Booker* statistics reveal that, on a national level, the vast majority of sentences imposed in federal criminal cases continue to fall within the sentencing guidelines range. Nationally, 85.9 percent of all sentences are either within the guidelines range or reflect government-sponsored, below-range sentences.<sup>1</sup> In criminal tax cases, arguments regarding the appropriate loss calculation and applicable enhancements continue to play a large role in sentencing practice. However, statistics reveal that, with increased frequency, courts are sentencing tax offenders outside the applicable guidelines ranges, and that the resulting terms of incarceration, are significantly below the sentences called for under the guidelines.

#### Sentencing Under 'Booker'

Under the sentencing guidelines, sentences in criminal tax cases were stiffer than those imposed pre-guidelines. The base offense level for tax offenders is generally determined by the amount of the tax loss caused by the offense, with enhancements for offense characteristics such as whether the offense involved "sophisticated means" or whether the unreported income was derived from criminal activity. In addition, like all offenders, defendants convicted of tax offenses are subject to other enhancements, such as those for a role in the offense and obstruction of justice. Prior to *Booker*, the guidelines adopted sentencing tables that imposed longer sentences for tax crimes than for other white-collar offenses involving comparable losses, resulting in a higher rate of incarceration for convicted tax defendants.<sup>2</sup> As a result, between 2000 and 2004, the average length of incarceration for tax offenders had increased each year, reaching an average length of 13.2 months in 2004.<sup>3</sup>

In *Booker*, the Supreme Court held that the mandatory enhancement of a sentence under



John J. Tigue Jr.

Jeremy H. Temkin

the sentencing guidelines based on facts not admitted by the defendant or found by a jury violates the Sixth Amendment. To remedy this constitutional violation, the Court rendered the sentencing guidelines "advisory."<sup>4</sup> After *Booker*, courts employ a two-step procedure in sentencing. First, a sentencing court must calculate the applicable guidelines range as was done pre-*Booker*. As part of this calculation, a sentencing judge is permitted to find facts relevant to sentencing, including those not considered by a jury. In determining the applicable guidelines range, the sentencing judge is also directed to consider not only the guidelines, but any available departures as well.<sup>5</sup>

The second step of the sentencing analysis requires the district judge to consider the statutory factors listed in 18 USC §3553(a) to determine whether a sentence within the guidelines range is appropriate. Section 3553(a) requires the imposition of a sentence sufficient but not greater than necessary to achieve respect for the law, just punishment, deterrence, protection of the public, and needed education or treatment, taking into account the nature of the offense, the history and characteristics of the defendant, the need to avoid unwarranted disparity, and the guidelines. Thus, while a court may consider facts not admitted by the defendant or found by a jury beyond a reasonable doubt in calculating the applicable guidelines range, whether the factors set forth in §3553(a) warrant the imposition of a sentence within that range is within the discretion of the district court and reviewable for reasonableness.

The application of the two-step methodology employed post-*Booker* can be seen in *United States v. Vasquez*, a tax case recently decided by the U.S. Court of Appeals for the Third Circuit.<sup>6</sup> In *Vasquez*, a New Jersey tax preparer was convicted of four counts of filing false claims with the Internal Revenue Service (IRS) and eight counts of aiding in the filing of false income tax returns, based on his use of Social Security numbers and identities of individuals,

without their knowledge or consent, to create false W-2 forms and false tax returns. The defendant then claimed refunds on behalf of these individuals and deposited those refunds in bank accounts that he controlled. In addition, Mr. Vasquez inflated tax refunds of his actual clients by fabricating deductions. The amount of tax loss set forth in the indictment was \$19,961.

Prior to sentencing, the government presented evidence of 52 additional false claims filed by Mr. Vasquez and more than 800 additional inflated tax returns as proof of a tax loss exceeding \$2.7 million. These losses, presented as "relevant conduct" under the sentencing guidelines, would have increased the calculated guidelines range to between 63 and 78 months. The defendant argued that the inclusion of loss amounts not alleged in the indictment violated his Sixth Amendment rights under *Booker*. The district court excluded evidence of these additional losses "because [it] believed a sentence based on losses not prove[d] at trial was unconstitutional." Considering only the loss amounts reflected in the indictment, the court imposed a sentence of 16 months. The government appealed the sentence, arguing that the sentencing judge erred in refusing to consider the government's evidence of tax loss.<sup>7</sup>

Finding that a sentencing court could not give "meaningful consideration" to the factors set forth in §3553(a) if it did not correctly calculate the applicable guidelines range, the Third Circuit vacated the sentence. The court observed that the sentencing court had "sidestepped" the first step of the sentencing analysis by refusing to consider tax loss evidence that, if found probative, would have resulted in a significantly higher offense level and guidelines range. "Under *Booker*, a trial judge is not obligated to sentence within the applicable guidelines range, but is obligated to consider the correct range as one of the §3553(a) factors."<sup>8</sup> Thus, post-*Booker*, the computation of loss amounts remains a significant (but not determinative) factor in sentencing.

Another example of how sentencing enhancements can alter the length of a sentence considerably is the upcoming sentencing of former Atlanta Mayor Bill Campbell. In early-March, Mr. Campbell was convicted by a federal jury on three counts of tax evasion, but acquitted on corruption charges. News accounts following the verdict described prosecutors as "subdued, but...not disappointed" with the split verdict.<sup>9</sup> Many have theorized that the government's reaction may be explained by post-*Booker* case law that permits courts to apply enhancements based on acquitted conduct where the judge believes the government has proved that

**John J. Tigue Jr.** is a principal in Morvillo, Abramowitz, Grand, Iason & Silberberg and a fellow of the American College of Trial Lawyers. **Jeremy H. Temkin** also is a principal in Morvillo, Abramowitz, **Gretchan R. Ohlig**, an attorney, assisted in the preparation of this article.

conduct by a preponderance of the evidence.<sup>10</sup>

The government claims that Mr. Campbell failed to report \$147,000 in income for the years 1997 through 1999, which resulted in an underpayment of approximately \$40,000 in taxes, with a corresponding guidelines range of 10 to 16 months imprisonment. However, should the sentencing judge find that Mr. Campbell received more than \$10,000 in unreported income in any one year illegally, the sentencing range could increase significantly.<sup>11</sup> Whether the court sentencing Mr. Campbell will consider the acquitted conduct and, if it does, whether it will find the resulting sentencing range reasonable under the factors set forth in §3553(a) remains to be seen.<sup>12</sup>

These cases demonstrate that courts continue to calculate applicable guidelines ranges in the same manner as before *Booker* and that such calculations include enhancements that can greatly increase a defendant's sentencing range above those based solely on a jury's verdict. The difference, therefore, lies in a practitioner's ability to argue that the factors set forth in §3553(a) warrant a sentence below the guidelines range. This is especially important in criminal tax cases as statistics indicate that courts may be sentencing outside the guidelines range more frequently in such cases and that the resulting sentences are significantly below the applicable guidelines.

## Post-'Booker' Sentencings

According to statistics issued by the U.S. Sentencing Commission on March 16, 2006, more than 74,000 federal sentencings have occurred since *Booker*.<sup>13</sup> Approximately 62 percent of the defendants in those cases were sentenced within the guidelines range, below the 64 percent to 72 percent of sentences falling within the guidelines range during the four years before *Booker*. While a little more than 1.5 percent of defendants sentenced after *Booker* received sentences above the guidelines range, almost 37 percent (or 27,189) received sentences below the guidelines range.

The commission's report divides sentences below the guidelines range into three categories: government-sponsored departures (the majority of which are substantial assistance motions); nongovernment-sponsored downward departures; and "other" cases where the sentence fell below the guidelines range. Of the 27,189 below-range sentences, 17,861 (approximately 66 percent) were government-sponsored departures (10,778 of which were substantial assistance departures); 2,399 (approximately 9 percent) were nongovernment-sponsored departures; and 6,929 (approximately 25 percent) were classified as "otherwise below the range," including 4,544 cases in which sentences were imposed in reliance on *Booker* or §3553(a).

In the U.S. Court of Appeals for the Second Circuit, within-range sentences fell below 50 percent from approximately 63 percent for both the 2003 and 2004 fiscal years. In addition, district courts within the Second Circuit had the highest percentage of below-range sentences imposed for reasons other than downward departure motions.<sup>14</sup> Additionally, despite pockets of slight increases or decreases, the commission's statistics reveal little overall variance in the average and median period of incarceration for the fiscal years before and after the *Booker* decision.<sup>15</sup>

## Below the Range

• **Tax Cases Sentenced Below the Guidelines Range.** The commission's report reveals that of the more than 74,000 defendants to have been sentenced since *Booker*, 768 had their offense conduct calculated under the sentencing guidelines' provisions applicable to tax offenses. Consistent with the figures for all offenses, 288 (approximately 37 percent) of these defendants received sentences below the applicable guidelines range. However, a relatively high percentage of these below-range sentences were imposed pursuant to *Booker* or §3553(a): 139 of the 288 (approximately 48 percent) below-range sentences in tax cases fell within this category, compared with 90 substantial assistance departures (approximately 31 percent), 15 "other government-sponsored" departures (approximately 5 percent), and 44 nongovernment sponsored departures (about 15 percent).

Both the 90 substantial assistance departures and the 44 nongovernment-sponsored-departures granted in tax cases since *Booker* resulted in a median sentence of zero months, reflecting 10-month median decreases from the applicable guidelines minimums.<sup>16</sup> Similarly, the median sentence imposed on the 15 tax defendants receiving "other government-sponsored" downward departures was five months, which also reflects a 10-month median decrease from the guidelines minimum. The extent of these departures is generally consistent with nontax-fraud cases: the median sentence imposed on the 1,009 fraud defendants receiving substantial assistance departures was three months, a 12-month median decrease from the guidelines minimum; the median sentence imposed on the 127 fraud defendants who received "other government-sponsored" downward departures was five months, a 10-month median decrease from the guidelines minimum; and the median sentence imposed on the 228 fraud defendants receiving nongovernment-sponsored downward departures was one month, a 10-month median decrease from the guidelines minimum.<sup>17</sup>

Finally, and perhaps most significantly, the 139 tax defendants receiving sentences below the guidelines range for reasons based on *Booker* or §3553(a) received a median sentence of one month in prison, which reflected a 10-month median decrease from the guidelines minimum. By contrast, the 752 fraud defendants in this category received a median sentence of five months, corresponding to a nine-month median decrease from the guidelines minimum sentence. Not only did the tax defendants fare slightly better than other fraud defendants in terms of median sentence and median decrease in terms of months, but when tax defendants are sentenced under *Booker* or §3553(a), the percentage decrease from the guidelines minimum is likely to be significant. Thus, the 10-month decrease in the median sentences for tax offenders reflects a 92 percent decrease from the minimum guidelines sentence, while the nine-month decrease accorded other fraud defendants constituted a 67.5 percent decrease.<sup>18</sup>

## Conclusion

Although the majority of federal sentences may remain within the guidelines range, these statistics reveal an increase in below-range sentences as well. Perhaps this is a sign that

sentencing judges are willing to exercise their enhanced discretion in sentencing outside the sentencing guidelines range—a trend that may increase as the advisory guidelines system takes hold.

Finally, although tax cases comprise a relatively small percentage of federal criminal cases, the statistics show both that courts are more likely to utilize §3553(a) in sentencing tax defendants, and that when a court sentences a tax offender outside the guidelines range, the impact on the defendant is significant and the term of imprisonment may be reduced substantially. For these reasons, defense attorneys should be especially vigilant in arguing for the application of the factors set forth in §3553(a) and the imposition of sentences below the advisory guidelines range.

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1. Final Report on the Impact of *United States v. Booker* on Federal Sentencing, United States Sentencing Commission, March 2006, at vi (available at [http://www.uscc.gov/booker\\_report/Booker\\_Report.pdf](http://www.uscc.gov/booker_report/Booker_Report.pdf)).

2. See John J. Tighe Jr. and Jeremy H. Temkin, "Bad News for Tax Offenders," *New York Law Journal*, May 17, 2001.

3. Statistics were taken from the Sentencing Commission's Sourcebooks of Federal Sentencing Statistics from 2000 to 2004, available at <http://www.uscc.gov/annrpts.htm>.

4. 543 US 220, 244 (2005).

5. *United States v. Crosby*, 397 F.3d 103, 111-114 (2d Cir. 2005).

6. 2006 WL 1026493 (3d Cir. April 19, 2006).

7. *Id.* at \*1.

8. *Id.* at \*\*2-3.

9. Jennie Jarvie, "Verdicts Mixed for Former Atlanta Mayor," *Los Angeles Times*, March 11, 2006.

10. See, e.g., Douglas A. Berman, "A High-Profile Case for Sentencing Based on Acquitted Conduct," *Sentencing Law and Policy Blog*, March 11, 2006 (available at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2006/03/a\\_high-profile\\_c.html](http://sentencing.typepad.com/sentencing_law_and_policy/2006/03/a_high-profile_c.html)).

11. Bill Rankin and Beth Warren, "The Bill Campbell Verdict: Defense Seeks to Head Off Prison Term," *Atlanta Journal and Constitution*, March 11, 2006.

12. The Second Circuit recently upheld the concept of sentence enhancements based on acquitted conduct in *United States v. Vaughn*, 430 F.3d 518, 526-27 (2d Cir. 2005). Observing that sentencing courts "remain statutorily obliged to calculate guidelines ranges in the same manner as before *Booker*," the court held that district courts may find facts relevant to sentencing by a preponderance of the evidence even where the jury has acquitted the defendant of the conduct at issue as long as "the judge does not impose (1) a sentence in the belief that the guidelines are mandatory, (2) a sentence that exceeds the statutory maximum authorized by the jury verdict, or (3) a mandatory minimum sentence...not authorized by the verdict." Thus, while a court is not required to take acquitted conduct into account in calculating a reasonable sentence, they are permitted to do so providing they "consider the jury's acquittal when assessing the weight and quality of the evidence presented by the prosecution...." *Id.*

13. U.S. Sentencing Commission Special Post-*Booker* Coding Project, U.S. Sentencing Commission, March 30, 2006 (available at [http://www.uscc.gov/Blakely/postBooker\\_033006.pdf](http://www.uscc.gov/Blakely/postBooker_033006.pdf)).

14. *Id.* at 7-8.

15. *Id.* at 1, 15.

16. The sentencing commission explains that "[w]hen conducting statistical analysis of small numbers of cases, extreme values in either direction will tend to have an undue impact on averages, thereby skewing the results of the analysis. By contrast, because the median represents the mid-point, use of this statistic provides a more moderate measure of the central tendency of the data. It represents the value of the "middle" case in a category: half of the cases have values below the median and the other half of the cases have values above the median. This is a more conservative approach to the statistical analysis of a small universe of cases, customarily accepted by researchers." Final Report on the Impact of *Booker* at 48.

17. Special Post-*Booker* Coding Project at 19-21.

18. *Id.* at 22.