

## TAX LITIGATION ISSUES

## Expert Analysis

# The Promise Of 'Booker' Revisited

In *Booker v. United States*,<sup>1</sup> the U.S. Supreme Court held that mandatory application of the U.S. Sentencing Guidelines was unconstitutional and that sentencing courts are required to consider various factors identified by Congress in determining an appropriate sentence in each case. In the wake of *Booker*, defense counsel were hopeful that district judges would impose more moderate sentences when allowed to consider their clients' history and characteristics and other individualized considerations.<sup>2</sup>

Five years ago, this column addressed the potential impact of *Booker* and its progeny on sentencing in federal tax cases, noting that preliminary data suggested that district judges were imposing non-guidelines sentences with greater frequency.<sup>3</sup> As reflected in the Sentencing Commission's most recent annual report, this trend has largely continued: The majority of the 605 defendants sentenced for criminal tax violations during the fiscal year ending Sept. 30, 2012, received sentences below the applicable guidelines range.<sup>4</sup> This compares favorably to statistics from the pre-*Booker* era.

The statistics published by the Sentencing Commission suggest, however,

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that while more defendants are receiving sentences below the applicable guidelines ranges, the percentage of defendants convicted of tax offenses receiving some prison time and the average period of incarceration imposed are both higher than they were before *Booker*. Thus, it appears that counsel representing defendants in tax cases are still fighting an uphill battle to keep their clients out of prison.

### Doing More With Less

The U.S. government relies on voluntary compliance by taxpayers who are expected to accurately report their income and deductions and to self-assess their tax obligations. The Internal Revenue Service (IRS) promotes compliance both through civil audits and criminal prosecutions, and empirical studies suggest that both of these enforcement tools deter underreporting.<sup>5</sup>

Over the past 20 years, the number of individual income tax returns filed has increased by 27 percent (from 113 million to 143 million). Over this same period, however, the IRS has gone from

an average of 117,945 employees during fiscal 1992 to an average of only 90,280 employees during fiscal 2012, an overall decline of 23 percent.<sup>6</sup> This includes an 18 percent decline in the number of revenue agents conducting civil audits (from 15,947 in 1992 to 13,011 in 2012) and a 12 percent decline in the number of special agents conducting criminal investigations (from 2,943 to 2,581).<sup>7</sup>

Having fewer revenue agents to review more returns, the IRS has sought to maintain a robust civil enforcement program through the use of semi-automated correspondence audits. While the IRS reports that it audited 1,481,966 individual returns in 2012, an increase of approximately 23 percent over the 1,206,019 returns audited in 1992, the increase is attributable to the extensive use of correspondence audits (up 145 percent over the past 20 years), as opposed to traditional face-to-face examinations (which have declined 52 percent over that period).<sup>8</sup> Significantly, while the number of audits per thousand returns filed have declined only slightly (from 10.7 to 10.3), only 2.5 of every 1,000 individual returns are filed subject to an in-person audit, compared to 6.6 per thousand returns filed in 1992.

On the criminal side, in its annual report for the fiscal year ending Sept. 30, 2012, the IRS Criminal Investigation Division (IRS-CI) touted the efficacy of

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its enforcement efforts by noting that it initiated 5,125 investigations during fiscal 2012 (up 8.6 percent from 4,720 in 2011) and recommended prosecutions of 3,701 individuals (up 8.5 percent from 3,410 in 2011). Moreover, 3,390 defendants were charged by either indictment or information (up 13 percent from 2,998 in 2011), and 2,634 defendants were convicted (up 12 percent from 2,350 in 2011) with the conviction rate of 93 percent (a slight uptick from the 92.7 percent conviction rate in 2011).<sup>9</sup>

By contrast, in 1992, the IRS initiated 6,473 criminal investigations, with 4,045 individuals being referred for prosecution, 3,477 defendants being charged and 2,778 convicted.<sup>10</sup> Thus, consistent with the theme of doing more with less, while 12 percent fewer special agents have initiated 21 percent fewer criminal investigations, they have recommended only 8.5 percent fewer prosecutions with 2.5 percent fewer defendants being charged and 5 percent fewer defendants being convicted. This suggests that IRS-CI has either dramatically improved its investigative skills or is focusing its limited resources on cases most likely to generate charges.

Perhaps to enhance the deterrent effect of its enforcement efforts, IRS-CI is apparently devoting more resources to traditional, legal source income cases (e.g., under-reported income and fraudulent deductions or credits), as opposed to illegal source income, money laundering and narcotics violations. Thus, 892 of the 2,634 (34 percent) defendants convicted in cases investigated by IRS-CI during fiscal 2012 were charged with legal source tax offenses, including fraudulent refund claims and fraud by return preparers, which reflects a dramatic increase over 1992 when 486 of 2,778 (17 percent) convictions arose out of the IRS's abusive compliance program.<sup>11</sup> Moreover, IRS-CI has succeeded in increasing the percentage of convicted defendants sentenced

to some element of confinement (either incarceration in prison, confinement to a halfway house or home detention).

In 1992, 2,547 (91.7 percent) defendants convicted in cases investigated by IRS-CI received sentences that included some element of confinement with 71.22 percent receiving some prison time. By contrast, 2,466 (93.6 percent) defendants convicted in 2012 were sentenced to some form of confinement, with 81.5 percent getting some prison time.<sup>12</sup>

### Impact of 'Booker'

One way to assess the impact of *Booker* on tax sentences, is to compare both rates and length of incarceration of the 605 defendants sentenced during fiscal 2012 in cases in which a tax violation was the primary offense charged with those of the 480 tax defendants sentenced during fiscal 2003, the last full year before the Supreme Court's decision in *Blakely v. Washington*,<sup>13</sup> which struck down Washington State's guidelines regime and served as a precursor to *Booker*. On first blush, the resulting data suggests that tax defendants have not benefited from *Booker*: the percentage of tax defendants who received some period of incarceration rose from 56.7 percent in 2003 to 64.3 percent in 2012, while the percentage of tax defendants who received probationary sentences with no element of confinement dropped from 21.3 percent in 2003 to 19.5 percent in 2012.<sup>14</sup> Moreover, the median sentence imposed on all defendants convicted of tax offenses increased from eight months in 2003 to 12 months in 2012,<sup>15</sup> and the median sentence imposed on defendants who received some period of incarceration went from 12 months in prison in 2003 to 18 months in prison in 2012.<sup>16</sup>

While these statistics imply that tax defendants have not seen lower sentences in the post-*Booker* era, the data is more favorable when compared with either all defendants sentenced during

fiscal 2012 or defendants sentenced for fraud offenses. Thus, the percentage of convicted defendants sentenced to prison rose from 86.3 percent in 2003 to 90 percent in 2012, with the median sentence remaining constant at 24 months and the median period of incarceration dropping from 33 months in 2003 to 30 months in 2012.

And while sentences imposed on defendants convicted of non-tax fraud offenses have been somewhat more lenient than those imposed on all defendants generally, the percentage of fraud defendants receiving some prison time increased from 56.7 percent in 2003 to 74.8 percent in 2012, while the median sentence rose from eight months to 12 months and the median period of incarceration went from 15 months in 2003 to 24 months in 2012.<sup>17</sup> Thus, defendants convicted in fraud cases are more likely to receive some period of incarceration and, if sentenced to prison, are likely to be there for longer than defendants convicted in tax cases.

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Rates and lengths of incarceration can be misleading, however, in part because they fail to account for changes in the sentencing guidelines over time. For example, a defendant sentenced in 2003 for evading \$500,000 of taxes on legitimate income earned in 2000 through a relatively simple scheme would face a sentencing range of 24 to 30 months if he was convicted after trial or 15 to 21 months if he pleaded guilty. However, a defendant who engaged in the same conduct in 2010 would face a sentencing range of 33 to 37 months after trial (or 24-30 months after a guilty plea) if sentenced in 2012.

Because district courts are required to consider the guidelines as one factor in sentencing defendants, the promise of *Booker* deals less with the length of an individual defendant's sentence and more with the greater flexibility accorded sentencing judges. Measured in this context, *Booker* has, in fact, substantially benefited criminal defendants generally and tax defendants especially.

Prior to *Booker*, the overwhelming majority of all defendants received guidelines sentences, and the majority of defendants who received sentences below the applicable guidelines range benefited from an application by the government, generally to reward the defendant for cooperating in the prosecution of others. Thus, 69.4 percent of all defendants sentenced during 2003 received sentences within the guidelines, and the vast majority (22.2 percent of 29.7 percent) of defendants sentenced below the applicable guidelines received more lenient treatment at the behest of the government.<sup>18</sup>

While tax defendants fared slightly better prior to *Booker*, they were still far more likely to be sentenced within than below the guidelines: 62.6 percent of tax defendants sentenced in 2003 received sentences within the guidelines, and 20.1 percent of the 37.2 percent of sentences below the guidelines range were supported by the government.<sup>19</sup> Meanwhile, 74.8 percent of defendants sentenced in fraud cases that year received guidelines sentences and 16.7 percent of the 24 percent of downward departures were attributable to government motions.

Post-*Booker*, these numbers have improved dramatically from the perspective of individualized sentencing: in 2012, 52.4 percent of all defendants received guidelines sentences and 45.6 percent were sentenced below the applicable guidelines range. While the majority of the below guidelines sentences were still sponsored by the government, one-third were based on defense applications

(based on either downward departure grounds or *Booker*).

In fraud cases, defendants were somewhat more likely to be sentenced below the guidelines range, with 50.4 percent of fraud defendants being sentenced within the guidelines, 47.5 percent being sentenced below the applicable guidelines, and roughly half of the below guidelines sentences being attributed to defense applications.<sup>20</sup>

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In tax cases, these numbers are even more striking. Less than half (36.9 percent) of all defendants convicted of tax offenses were sentenced within the applicable guidelines range and two-thirds of the 62.1 percent of sentences below the guidelines were predicated on a defense motion. Finally, defendants in tax cases who succeed in obtaining a sentence below the applicable guidelines range were able to reduce their sentences substantially, with the 27 defendants who received downward departures getting no jail time and the 197 defendants whose sentences were reduced pursuant to *Booker* receiving a median sentence of one month in prison.<sup>21</sup>

### Conclusion

Statistics released by the Sentencing Commission relating to sentences imposed during fiscal 2012 suggest that defendants convicted of tax crimes are more likely to be incarcerated than defendants sentenced during 2003.

However, the data further indicates that sentencing judges are increasingly willing to impose sentences substantially below the applicable guidelines ranges. While these results may be incongruous, they highlight the importance of defense counsel focusing the court's attention on the defendant's individual characteristics and the factors that warrant a non-guidelines sentence.



1. 543 U.S. 220 (2005).
2. See 18 U.S.C. §3553(a).
3. See John J. Tigue Jr. and Jeremy H. Temkin, "The Promise of 'Booker': Probationary Sentences in Tax Cases," *New York Law Journal* (Nov. 20, 2008).
4. United States Sentencing Commission, 2012 Sourcebook of Federal Sentencing Statistics ("2012 Sourcebook") (available at [http://www.usssc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/sbtoc12.htm](http://www.usssc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm)) at Table 27.
5. Jeffrey A. Dubin, "Criminal Investigation Enforcement Activities and Taxpayer Noncompliance," (available at <http://www.irs.gov/pub/irs-soi/04dubin.pdf>).
6. Transaction Records Access Clearinghouse, TRAC-IRS, "IRS Audits Slump, Staff Down Long-term Impact Uncertain" (available at <http://trac.syr.edu/tracirs/newfindings/current/>) (hereinafter "TRAC Report, IRS Audits Slump").
7. See Internal Revenue Service, 1992 Annual Report, "Table 30—Internal Revenue Service Personnel Summary" (available at <http://www.irs.gov/pub/irs-soi/92dbfullar.pdf>); 2012 Internal Revenue Service Data Book, "Table 30. Personnel Summary, by Employment Status, Budget Activity, and Selected Personnel Type, Fiscal Years 2011-2012" (available at <http://www.irs.gov/pub/irs-soi/12databk.pdf>).
8. TRAC Reports, IRS Audits Slump (noting that face-to-face audits have declined from 746,806 in 1998 to 358,435 in 2012, while correspondence audits have increased from 459,213 in 1998 to 1,123,531 in 2012).
9. Internal Revenue Service Criminal Investigation, Fiscal 2012 National Operations, Annual Business Report at 4.
10. Internal Revenue Service, 1992 Annual Report, "Table 20—Criminal Investigation Program" (available at <http://www.irs.gov/pub/irs-soi/92dbfullar.pdf>).
11. 2012 Internal Revenue Service Data Book, "Table 18. Criminal Investigation Program, by Status or Disposition, Fiscal Year 2012" (available at <http://www.irs.gov/pub/irs-soi/12databk.pdf>); Internal Revenue Service, 1992 Annual Report, "Table 20—Criminal Investigation Program".
12. While the IRS's statistics reflect the full range of criminal cases investigated by IRS-CI, the statistics for legal source income cases are consistent, with 92.4 percent of the defendants sentenced in such cases during fiscal 2012 receiving some combination of prison, halfway house or home detention and 81.7 percent getting some prison time.
13. 542 U.S. 296 (2004).
14. Compare United States Sentencing Commission, 2003 Sourcebook of Federal Sentencing Statistics ("2003 Sourcebook") (available at [http://www.usssc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2003/ar03toc.htm](http://www.usssc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2003/ar03toc.htm)) at Table 12 with 2012 Sourcebook at Table 12.
15. Compare 2003 Sourcebook at Table 13 with 2012 Sourcebook at Table 13. This statistic treats sentences of probation as zero months in prison.
16. Compare 2003 Sourcebook at Table 14 with 2012 Sourcebook at Table 14. This statistic excludes sentences with no period of incarceration in prison.
17. Compare 2003 Sourcebook at Tables 12-14 with 2012 Sourcebook at Tables 12-14. Among the factors explaining the relative treatment of tax offenders compared with other defendants is both the Offense Levels set by the Sentencing Commission and the fact that tax defendants overwhelmingly fall within Criminal History Category I. See 2003 Sourcebook at Table 14; 2012 Sourcebook at Table 14.
18. See 2003 Sourcebook at Tables 27, 27A.
19. Because tax offenses are often committed without culpable confederates, tax defendants had fewer opportunities to cooperate.
20. See 2012 Sourcebook at Tables 27, 27A.
21. See 2012 Sourcebook at Tables 31A-31D.