

DOJ Announces Major New Shift in Criminal Sentencing in Offshore Tax Matters



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At the 34th Annual National Institute on Criminal Tax Fraud in Las Vegas yesterday afternoon, Mark Daly, DOJ Tax Division Senior Litigation Counsel announced a major new shift in how the Department of Justice plans to argue offshore tax prosecution defendants should be sentenced.

Instead of turning to the standard Part 2T of the United States Sentencing Guidelines (Offenses Involving Taxation), the DOJ will now assert that Part 2S1.3 (Money Laundering and Monetary Transaction Reporting) is the correct guideline for offshore tax cases.

Why does this matter? Two reasons. First, Part 2T uses the amount of tax loss as the primary determinant of the offense level. Part 2S1.3 instead uses the entire value of the offshore bank accounts. Thus, for your offshore tax defendants, instead of a sentencing base level determined by the amount of tax loss to the IRS as determined from the flow through of that undisclosed income on the relevant tax return, instead the DOJ will argue that the full value of the offshore bank account should be used to determine the offense level. Daly gave the example of his *United States v. Kim* case in the Eastern District of Virginia, where the Part 2T tax loss was on the order of \$150,000, but the Part 2S1.3 value was \$28 million. Depending upon the circumstances, that could be a ten-fold increase in the sentence. In *Kim*, the DOJ asserted that Part 2S1.3 was the correct guideline, but due to a prior agreement with the defendant, the DOJ would in that case agree to sentencing based on Part 2T. Daly stated that the DOJ intended its language asserting that Part 2S1.3 was the correct guideline as a warning to the defense bar in other such cases.

The second problem is that Part 2S1.3 allows for a 2-level enhancement where a defendant has also been convicted of an offense under subchapter II of chapter 53 of title 31—which includes filing a false or misleading FBAR. Because an FBAR must be filed each year along with the tax return, the DOJ will now seek to add charges under title 31 chapter 53 to obtain a 2-level enhancement at sentencing.

Daly stated that the DOJ may still assert that Part 2T is the correct guideline in certain offshore tax cases, but he was unwilling to articulate—despite pointed questions from the audience—just what criteria the DOJ would use to make such distinctions. Daly would only state that such decision was “above his pay grade,” that he expected that policy guidance would be “forthcoming,” and that no one who could speak to such guidance was present at the conference.

To say that Daly’s statements created a fervor among the defense bar attendees would be an understatement. This is a major sentencing shift which can wildly escalate the offense level applicable to such defendants, and one which the defense bar must watch very closely. As of right now, we can only stay tuned for guidance.

