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Criminal Tax Cases: Sentences Courts Don't Have to Like, and Opportunities for Advocacy

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Despite the government's strong protests, a sentence that appeared to be significantly less onerous than what the federal Sentencing Guidelines recommended was upheld on rehearing by the Third Circuit. It remains to be seen whether the combination of the sentencing judge's discretion and the appellate court's abuse-of-discretion standard of review will benefit other, similarly situated miscreants.

EDITED BY ROBERT S. FINK, LL.M.

The evolution of sentencing law for legal-source, federal income tax defendants continued its progress in 2009, when the non-incarceration sentence of a familiar client archetype—the owner and operator of a closely held business—was upheld on appeal by the Third Circuit sitting *en banc*.

In *Tomko*, 100 AFTR 2d 2007-5621, 498 F3d 157 (CA-3, 2007), *aff'd en banc* 103 AFTR 2d 2009-1808, 562 F3d 558 (CA-3, 2009), appellate review of defendant Tomko's sentence, on the familiar deferential abuse-of-discretion standard, deemed the sentence reasonable despite its significant departure from the recommended U.S. Sentencing Guidelines range. This affirmed sentence, consisting of a remedial blend of probation (including home confinement), community service, restitution, and fees, was undoubtedly welcome news to tax controversy defense practitioners who saw the opportunity for obtaining increasingly individualized sentences through skilled advocacy before the sentencing judge. The sentence was objected to by the government, which throughout the appeal process expressed its disagreement with Tomko's confinement "in a gilded cage."

The *Tomko en banc* affirmance is newsworthy to tax controversy practitioners because it provides published guidance for the defense practitioner ¹ at both the sentencing and appellate levels. It also is a comprehensive opinion applying the deferential abuse-of-discretion standard of review, and the process for reviewing "reasonableness" as established by the Supreme Court in *Gall v. U.S.*, 552 US 38, 169 L Ed 2d 445 (2007). Several other recent constructions of *Gall* have occurred in cases of non-tax, non-white-collar offenders, making application of those opinions to tax fact patterns often challenging and—given the fact-based nature of sentencing—haphazard.

The *Tomko* sentence affirmation—in addition to creating opportunities for tax controversy defense practitioners to advocate individualized sentences—also creates the need for Assistant U.S. Attorneys, previously used to limited-scope arguing over Guideline ranges and departure motions, to advocate more thoroughly in the future if they wish to avoid more "gilded cage" sentences. Ironically, these developments come at a time when the U.S. Sentencing Commission admits that the cost of incarcerating white-collar criminals is so great as to advocate itself for alternatives to incarceration for nonviolent offenders. ²

The value of the affirmation of the *Tomko* sentence can be best appreciated after a review of the case, and the placing in context of the Third Circuit's *en banc* opinion in the recent history of federal criminal sentencing.

THE CRIME

From 1996 through 1998, construction company owner William Tomko caused 12 subcontractors as well as his general contractor to work on the construction of his luxurious new home in southwestern Pennsylvania and to falsify their billing invoices to show that they were instead performing work for W.G. Tomko, Inc., an S corporation.

W.G. Tomko, Inc. paid the subcontractors in the ordinary course of its business and illegally deducted the expenses as expenses of the company. Tomko, individually, did not report the value of the construction costs paid for by his company as income on his personal returns. A lengthy probe by the Service's Criminal Investigation Division found numerous subcontractors willing to testify that Tomko, individually, had directed them to "creatively" invoice their work done on the home. On 5/11/04, Tomko waived indictment and pled guilty to a one-count charge of tax evasion pursuant to Section 7201, with a stipulated tax loss of \$228,557, for tax year 1997.

THE SENTENCE

At sentencing on 9/30/05, the district court judge calculated Tomko's sentence as follows. Tomko's base offense level under 1997 U.S. Sentencing Guidelines sections 2T1.1 and 2T4.1, given the violation of Section 7201 and tax loss in excess of \$225,000, was 16. The court declined to enhance Tomko's sentence for his alleged leadership role in the offense or obstruction of justice, as requested by the government, but did grant a three-level downward departure for acceptance of responsibility. The resulting Sentencing Guidelines offense level was 13, corresponding to a recommended sentencing range of 12 to 18 months of incarceration. The Guidelines also dictated a fine in the range of \$3,000 to \$30,000.

Tomko's counsel called witnesses at sentencing who testified as to the defendant's service to a local Habitat for Humanity affiliate for both local and Hurricane Katrina work. Also called was W.G. Tomko, Inc.'s CFO, who testified as to the likely harm that Tomko's company and its innocent employees would suffer during the incarceration of the company's owner and operator. Tomko's counsel also offered several dozen letters from friends, family, and local citizens attesting to Tomko's numerous charitable works and acts of generosity, many anonymous.

While Tomko had volunteered to aid Habitat for Humanity after his indictment, a fact that could lead cynics and the prosecution to discount the sincerity of his altruistic impulses, the judge did not find so; perhaps the court was persuaded by the letters attesting to pre-indictment good acts and the testimony of Habitat for Humanity executive directors as to the expertise Tomko could offer project needs in Pittsburgh as well as New Orleans.

These testimonies and letters supported the defense's motion for a downward departure, which set forth the following grounds:

- (1) The negative effect on Tomko's business of his incarceration, including job loss to more than 300 innocent employees.
- (2) Tomko's exceptional community and charitable activities.
- (3) His extraordinary acceptance of responsibility.
- (4) A combination of other factors.

The numerous letters of support for Tomko, attesting to his good character, were attached as exhibits to the motion.

Application of the Guidelines. As required by 18 U.S.C. section 3553(c) and the Supreme Court in *U.S. v. Booker*, 543 US 220, 160 L Ed 2d 621 (2005), the court stated, on the record, its consideration of the relevant Guidelines and the purposes of sentencing set forth separately in 18 U.S.C. section 3553(a).

In considering the factors set forth in section 3553(a)(1), the court found that Tomko's offense was nonviolent and not part of a recurring pattern, and noted his personal circumstances, family history, and education. It also noted a drinking problem that would benefit from treatment, and depression already under treatment. In considering the factors set forth in section 3553(a)(2), the court weighed the seriousness of the offense of tax evasion against Tomko's otherwise crime-free life and low probability of recidivism. Finally, in consideration of the factors set forth in sections 3553(a)(3), (4), and (6), the court reviewed the kinds of sentences available, the need to reduce unwarranted sentence disparities among defendants with similar records who were convicted of similar conduct, and acknowledged that in general such considerations favored sentencing a defendant within a Guidelines range.

The government urged the court to sentence Tomko to incarceration rather than home confinement, as he had "cheated his Government out of the money to build his house" and "it would be a travesty of justice to put [Tomko] in the very mansion he stole from the Government." It argued, further, that a sentence less rigorous than one of incarceration would send the message that "you can buy your way out of trouble" as "real deterrence is jail."

Notwithstanding its review of the factors in sections 3553(3), (4), and (6), or the government's passionate advocacy of a sentence of incarceration, the court sentenced Tomko to 250 hours of community service, three years of probation with one year of home confinement, 28 days of in-house alcohol abuse treatment, and ordered a fine of \$250,000. It reasoned that while a sentence of probation and home confinement was below the Guidelines'

recommended sentence, the \$250,000 fine was greater than that recommended by the Guidelines, and with Tomko's wealth the recommended Guidelines fine would be insufficient punishment. The court stated that it mitigated the recommended sentence after review of section 3553, "taking all of these factors into account" and that its sentence "will address the sentencing goals of punishment, deterrence and rehabilitation."

APPEAL TO THE THIRD CIRCUIT

The government appealed the sentence. On 8/20/07, the Third Circuit overturned the lower court's sentence as unreasonable and remanded it for resentencing.³ The court, following the Supreme Court's guidance from *Rita v. U.S.*, 551 US 338, 168 L Ed 2d 203 (2007), reviewed the sentence on a deferential reasonableness standard and found it substantively unreasonable, or "'illogical and inconsistent' with the §3553(a) factors," in its failure to "reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, ... or provide adequate deterrence...."

The appellate court seemed especially troubled by its belief that the sentencing judge failed to sufficiently take into account both "specific deterrence," i.e., deterrence of the defendant's future criminal conduct, and "general deterrence," i.e., deterrence of others. It noted that "our Court has recognized that §3553(a) requires the sentence imposed to be 'minimally sufficient to satisfy concerns of retribution, *general deterrence*, specific deterrence, and rehabilitation.'" ⁴

Commenting that "Tomko's was no garden variety tax evasion offense," and believing "that closer appellate scrutiny of sentences that deviate from the norm is necessary to prevent the unwarranted disparities that bedeviled the pre-Sentencing Reform Act discretionary sentencing regime and prompted reform," the appellate court discounted all of the section 3553(a) mitigating factors. It found Tomko's negligible criminal history, family and educational circumstances, and charitable works common to other white-collar offenders and unexceptional.

The court concluded that in a case of "tax evasion as willful and brazen" as Tomko's, a "sentence of mere probation, in light of [the factors suggesting that a term of imprisonment is warranted], is unreasonable and it was an abuse of discretion for the District Court to impose it.... '[P]ermitting greater leniency in sentencing in those cases in which restitution is at issue and is a meaningful possibility (i.e., generally white-collar crimes) would, we believe, nurture the unfortunate practice of disparate sentencing based on socio-economic status, which the guidelines were intended to supplant.'" ⁵

The Third Circuit panel responsible for the 8/20/07 opinion ruled on the initial *Tomko* sentence in the aftermath of *Booker*, at a time when practitioners were heralding a new era of sentencing discretion⁶ and shortly before the standards for "reasonableness" review of criminal sentences took a dramatic turn with the Supreme Court's December 2007 opinions in *Gall* and in *Kimbrough v. U.S.*, 552 US 85, 169 L Ed 2d 481 (2007).

THE EN BANC OPINION

In Tomko's appeal of the 8/20/07 opinion, the court on 9/25/07 granted his motion to stay proceedings and for additional extension of time within which to file a petition for rehearing *en banc*, pending the Supreme Court's decisions in *Gall* and *Kimbrough* (which were scheduled for oral arguments on October 2). Within two weeks of the Supreme Court's issuance of the opinions in *Gall* and *Kimbrough*, Tomko duly filed a petition for rehearing *en banc*, and on 1/17/08 the Third Circuit issued an order granting Tomko a panel rehearing and vacating the 8/20/07 opinion. Subsequently, *Gall* and its precedent-setting discussion of procedural and substantive appellate review dictated the tone and the contents of the 11/19/08 oral argument and the 4/17/09 opinion affirming the district court judge's original sentence.

The opposing forces—the district court's belief that the non-incarceration sentencing of William Tomko sufficiently addressed the sentencing goals of punishment, deterrence, and rehabilitation vs. the government's and the 8/20/07 Third Circuit majority panel's outrage over Tomko's sentencing to a 8,000 square foot "gilded cage"—reflect a wider debate raging since the 1970s over the purposes of sentencing. Until the Sentencing Reform Act of 1984 was enacted, establishing the U.S. Sentencing Commission,⁷ debate in Congress over the appropriate ends of a uniform federal sentencing policy oscillated between liberal desire for rehabilitation and alternatives to incarceration and conservative desire for longer terms of incarceration and restraints on judicial discretion to deviate from them.⁸

When the Commission promulgated them in 1987, the Sentencing Guidelines embodied the contemporary Congress's primary purposes of promoting honesty in sentencing (e.g., ending the practice of a judge sentencing a defendant to 12 years in prison, only to have the Parole Commission release the prisoner after four years) and reducing sentencing disparities.⁹ The Guidelines also reflected the Commission's belief, derived from analysis of approximately 10,000 criminal cases, that significant discrepancies existed in pre-Guidelines sentences of white-collar criminals,¹⁰ and that it was necessary to address this inequity by requiring "short but certain terms of confinement" for tax, antitrust, and

insider trading offenders, who otherwise would likely have received a sentence of probation. [11](#)

Although the *Tomko* rehearing was stayed pending the rulings in *Gall* and *Kimbrough*, the 4/17/09 *Tomko en banc* opinion shows the strong influence of another 2007 Supreme Court case, *Rita*, in its direction that a district court should begin all sentencing proceedings by calculating the applicable Guidelines range, then considering all section 3553(a) factors, making an individualized assessment based on the facts presented and adequately explaining the chosen sentence, to allow for meaningful appellate review. For a below-Guidelines sentence, the Supreme Court said, the district court must consider the extent of the deviation and ensure that the justification for deviation is sufficiently compelling.

When the Third Circuit, *en banc*, sat for the *Tomko* rehearing on 11/19/08, it brought a new attitude towards "reasonableness" review, dictated by the Supreme Court's affirmation of non-incarceration sentences for the defendants in *Gall* and *Kimbrough*. While the 8/20/07 opinion took a position that might be characterized as "we don't like the sentence, therefore it is unreasonable," the 11/19/08 oral argument and 4/17/09 affirmation took a position straight from *Gall*—"this sentence is reasonable, and it doesn't matter if we don't like it."

Gall established the process for procedural and substantive appellate review after a district court has properly followed *Rita* to calculate, evaluate, and explain a sentence: first review for procedural soundness (e.g., no error in calculating a Guidelines range or erroneous treatment of the Guidelines as mandatory) and then, taking all factors into account, review for substantive reasonableness (notwithstanding the fact that the appellate court might have preferred a different sentence). The *Gall* Court explained this process as follows:

"In *Booker* we invalidated both the statutory provision, [section 3553(b)(1)], which made the Sentencing Guidelines mandatory, and [section 3742(e)], which directed appellate courts to apply a *de novo* standard of review to departures from the Guidelines. As a result of our decision, the Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are 'reasonable.' Our explanation of 'reasonableness' review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions."

The Supreme Court in *Gall* also made the point that appellate courts may not apply a presumption of unreasonableness to below-Guidelines sentences, as well as the point that a sentence of probation imposes substantial restrictions on one's liberty and thus constitutes a not-negligible form of punishment.

The *Gall* opinion also echoed the Supreme Court's prior discussions in *Rita* and in *Koon v. U.S.*, 518 US 81, 135 L Ed 2d 392 (1996), of the institutional advantage district courts have over appellate courts in making individualized sentence determinations. The *Gall* court found that a "sentencing judge is in a superior position to find facts and judge their import under §3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record." [12](#)

All of this paved the way for the *Gall* Court's affirmation of the district court's entirely non-incarceration sentence, stating: "On abuse-of-discretion review, the Court of Appeals should have given due deference to the District Court's reasoned and reasonable decision that the §3553(a) factors, on the whole, justified the sentence."

Gall and *Tomko* taken together establish a road map for future defense opportunities at sentencing. The *Tomko* court at the 11/18/08 oral argument, charged by *Gall* to look at all section 3553(a) factors (not only the need "to afford adequate deterrence" under section 3553(a)(2)(B) but also the general direction "to impose a sentence sufficient, but not greater than necessary, to comply with" the general purposes of sentencing under section 3553(a)), questioned the government's position, noting that section "3553(a) has seven factors and numerous subparts. Only one of the subparts deals with general deterrence. And [the government's] entire brief deals only with deterrence...." [13](#)

The court admitted that "[i]f any one of a significant number of the members of this Court—including some in today's majority—had been sitting as the District Judge, Tomko would have been sentenced to some time in prison." Despite its dislike of the sentence, the majority concluded that, in the aftermath of *Gall*, such a fact is "insufficient to justify reversal of the district court." It held that "[w]here, as here, a district court decides to vary from the Guidelines' recommendations, we 'must give due deference to the district court's decision that the §3553(a) factors, on a whole, justify the extent of the variance.'" After giving such due deference, the Third Circuit affirmed the sentence as procedurally and substantively reasonable in its honoring of the diverse purposes and goals of section 3553(a).

Applying *Gall*

The 4/17/09 *Tomko* opinion is a study in the application of *Gall* to a criminal tax case, as to both the deferential abuse-of-discretion standard of review and the process of evaluating procedural and substantive reasonableness. The *Tomko* opinion makes a well-reasoned case for resurgent judicial discretion, skilled advocacy at sentencing, and

deference to the lower court's practical wisdom.

After reciting *Tomko's* facts, the rehearing majority noted that at sentencing the government "did not challenge Tomko's factual assertions or submissions" (of charitable works, harm to his innocent employees in the event of his incarceration, or of the mountain of letters from friends and family attesting to his good character), but rather juxtaposed Tomko's tax evasion "with the patriotism of American soldiers fighting wars abroad" and concluded that failing to send Tomko to prison "would compromise the general deterrent effect that tax laws have on potential tax cheats." The government's choice to advocate its position in a tax evasion case with an appeal to patriotism convinced neither the district court nor the rehearing majority, as the majority went on to apply *Booker's* review for "unreasonableness" under *Gall's* abuse-of-discretion standard, apparently convinced of both the sincerity of Tomko's claims and the intended flexibility of the advisory Guidelines and section 3553(a) purposes.

First, the rehearing majority explained how it must evaluate the sentence by the "familiar" abuse-of-discretion standard promoted in *Gall*. In an evidentiary context, an abuse of discretion would be seen in arbitrary, fanciful, or clearly unreasonable admission of evidence, such that "no reasonable person would adopt the district court's view." The court restated the two basic principles that underlie application of the abuse-of-discretion standard: use of deferential review when the matter was originally decided by someone thought to have a better vantage point and use of deferential review when fact-bound issues are under review "that are ill-suited to appellate rule-making."

These principles recall *Koon's* acknowledgment that district court departures from the Guidelines are owed substantial deference and, as such, courts were required to "make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." They also recall *Gall's* direction that, in the wake of *Booker*, it is essential for courts to make "individualized assessments" and to provide courts of appeal with sufficient explanations in order to show that case circumstances have been considered within the parameters of section 3553(a) and the existence of sufficient justifications for sentencing conclusions.

Sufficiency cannot be articulated, because of the fact-bound nature of each sentencing decision. Nevertheless, appellate courts may demand more than a "rote recitation" of section 3553(a) factors "if at sentencing either defendant or the prosecution properly raises 'a ground of recognized legal merit (provided it has a factual basis)' and the court fails to address it."

After establishing that a district court must subject a defendant's sentence "to the thorough adversarial testing contemplated by federal sentencing procedure" (quoting *Rita*), the *Tomko* rehearing majority explained its process of procedural and substantive review. This process ensures that "no significant procedural error" occurred, such as failing to calculate the Guidelines range properly or treating the Guidelines as mandatory. "If a district court's procedure passes muster, 'we then, at stage two, consider its substantive reasonableness.'" ¹⁴

The court had more difficulty succinctly explaining substantive reasonableness. It required review of the "totality of the circumstances," and one "cannot presume that a sentence is unreasonable simply because it falls outside the advisory Guidelines range." The court explained application of the abuse-of-discretion standard to both procedural and substantive reasonableness as follows. An abuse of discretion occurs when a district court bases its decisions on a clearly erroneous factual conclusion or legal conclusion, and an appellate court must give due deference to the district court's determination that the section 3553(a) factors justify the sentence. "In other words, if the district court's sentence is procedurally sound, we will affirm it unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided." The "touchstone of 'reasonableness' is whether the record as a whole reflects rational and meaningful consideration of the factors enumerated" in section 3553(a).

The Third Circuit *en banc* rejected the government's allegation that the district court failed to consider general deterrence, finding that the record clearly showed the district court listening to the government's arguments and rejecting them, and that the district court judge stated on the record that the sentence addressed "the sentencing goals of punishment, *deterrence* and rehabilitation" (emphasis by the court). The appellate court found no procedural error in this treatment.

The crux of the government's appeal of Tomko's sentence rested on its claim that the sentence was substantively unreasonable because:

- (1) Detention in the house Tomko built with the proceeds of his tax evasion was unreasonable.
- (2) The case was a "mine-run" case of tax evasion undeserving of a lenient sentence.
- (3) The statutory maximum fine was insufficient to cure the substantive unreasonableness.

The appellate court quickly disposed of the first and third points. As to the first, although Tomko's "gilded-cage" confinement had "a certain unseemliness to it, ... [w]hether detention in a particular home is appropriate punishment is precisely the type of fact-bound inquiry that a sentencing court is better suited to make." The third point, the court said, relied on a misreading of the sentencing record (the greater fine and lesser sentence were discussed disjunctively).

The second claim, that the sentence was substantively unreasonable because Tomko's case was a mine-run case undeserving of such a deviation, merited more of the court's time. It noted that the deferential abuse-of-discretion standard of review applies to all cases, mine-run or not, and that the government erroneously relied on *Kimbrough* when it attempted to argue from that case and its discussion of departures based solely on a policy disagreement with the Guidelines, not on a section 3553(a) analysis. It also revisited the "proportionality test" discussed in *Rita* and rejected in *Gall*, although it conceded that while an appellate court "may look for a more complete explanation to support a sentence that varies from the Guidelines" or "properly consider the extent of any variance from the Guidelines," neither circumstance elevated the standard of review beyond the deferential abuse-of-discretion standard.

The court *en banc* found the sentence procedurally and substantively reasonable in its review of the district court's explicit examination of many subsections of section 3553(a), ordering restitution per section 3553(a)(7), hearing and responding to the government's arguments regarding need for a term of imprisonment, and providing specific reasons for its grant of a sentence varying from the Guidelines. The Third Circuit noted that if the government or other parties were displeased with the amount of discretion that *Booker* and *Gall* could admit into the sentencing process, and the possibility that convicted tax evaders like William Tomko could serve out their sentences in relative comfort (deprivations of probation and public shaming notwithstanding), Congress is equipped to revise the sentencing system.

In summary, the Third Circuit made two important observations. First, the substantive review of each sentence must be evaluated on its own terms, in light of individual facts and circumstances. Second, "reasonableness review requires us to do nothing more and nothing less than to apply the deferential abuse-of-discretion standard, a role quite familiar to us [citing *Gall*]. We do not seek to second guess."

The dissent. The *Tomko* rehearing dissent disagreed with the majority's statement about doing "nothing more and nothing less" than performing deferential review (although, like the majority, the dissent quickly dismissed any suggestion that the original sentence was procedurally unreasonable). The dissent broke with the majority on the issue of substantive reasonableness, however, finding that term to establish a range of reasonable sentences, with Tomko's non-incarceration sentence falling below the lower bounds of reasonableness.

The dissent found the sentence to be insufficiently supported by the facts and circumstances of Tomko's negligible criminal history, employment record, and community and charitable activities. It felt (as had the original Third Circuit panel on 8/20/07) that the good works were not sufficiently extraordinary and the man himself insufficiently sympathetic or exceptional to merit a sentence below the Guidelines' purposefully enhanced punishments for white-collar offenders.

While the sentencing court and the *en banc* majority were moved by Tomko's charitable works, acts of generosity and contribution of his skills to Habitat for Humanity, the original appellate panel, the rehearing dissent, and the government all shared a more skeptical view of the spirit in which friends and family submit letters at sentencing (sensing perhaps more arm-twisting than sincere belief), and found Tomko's volunteering with Habitat for Humanity suspiciously "well timed" (falling as it did after indictment and prior to sentencing). (*Query* what defense attorney would forgo the opportunity to position a client in a more sympathetic light through good works, "well-timed" or not.)

CONCLUSION

The 4/17/09 *Tomko en banc* opinion, taken as a whole, presents a double-edged sword for the defense practitioner. On one hand, it is an excellent example of the application to a tax-evasion case of the Supreme Court's sentencing guidance from *Booker* through *Gall*, and a demonstration of the discretion that a sentencing judge has, after reviewing the carefully advocated and strategically presented totality of facts and circumstances for an offender and offense. On the other hand, it highlights two pitfalls of the new judicially created sentencing discretion.

First, the rehearing majority and dissent agreed that had they been in the district court's shoes, they would have imposed a sentence including incarceration. Those opinions demonstrate how easily the sentencing court could have discredited Tomko's counsel's advocacy and proofs of his client's exceptional works. One judge's proof of charitable works deserving of a below-Guidelines sentence may be in another judge's eyes a manipulated, or mediocre, attempt at casting a garden-variety offender in a positive light. Tomko's fate, at his original sentencing, could easily have been otherwise had the district court judge received, or perceived, a different portrait of the defendant.

Second, the possibility remains that increased discretion in sentencing and opportunities for advocacy may have a backlash effect and cause some judges to retreat to the safe and familiar practice of granting Guidelines sentences as though they were still mandatory. Nancy Gertner, one of the many commentators concerned with this possibility has noted that *Booker* "did not unleash judges and herald a return to indeterminate sentencing" and that the vast majority of judges "in the vast majority of cases did essentially nothing new" after *Booker*.¹⁵ Judge Gertner speculates that this is due in part to the fear of some judges that after nearly 20 years of Guidelines they were no

longer competent to make sentencing judgments, and in part to those other judges who "never saw a Guideline sentence they didn't like" despite the disrespect for law promoted by harsh punishments that fail to take into account individual facts and circumstances. [16](#)

Unpopular sentences, for example those that allow tax evaders to serve time in 8,000 square foot "gilded cages" with home theaters, could heighten this sense and cause a return to the certainty of the Guidelines. Also, judicial irritation with the scope of wrongdoing and defendant arrogance in individual cases have arguably contributed to the lengthy sentences received by celebrity tax-evasion defendants, such as the actor Wesley Snipes among others. [17](#) It remains to be seen whether the government will appeal the Third Circuit's opinion to the Supreme Court, and whether the Court will take this opportunity to expand on its sentencing guidance (or in a changed political environment, apply a new ideological agenda).

It also remains to be seen whether, or how, federal courts will respond to the Commission's request for alternative sentences for nonviolent offenders in this era of skyrocketing prison costs and overpopulation, when more than one out of every 100 Americans, or 15%-25% of all federal offenders, is incarcerated for an estimated total cost of \$49 billion per year. [18](#) In any event, *Tomko* as both an individual opinion and a case in a long precedential chain is worth notice by tax controversy practitioners for what it suggests about future defense strategies and "reasonableness" traps for the unwary.

Practice Notes

Attorneys representing clients convicted of tax evasion may be encouraged by the outcome in *Tomko*. Strong advocacy of reasons for a downward departure from the Sentencing Guidelines, if successful before the sentencing judge, may be upheld on appeal given the application of the deferential abuse-of-discretion standard.

[1](#)

As discussed in Professor Douglas Berman's Sentencing Law and Policy blog, defense victories and downward departures continue to remain rare (or suppressed) in legal news. See sentencing.typepad.com/sentencing_law_and_policy/2009/02/why-do-defense-wins-in-sentencing-appeals-often-go-unpublished.html.

[2](#)

U.S. Sentencing Commission, *Alternative Sentencing in the Federal Criminal Justice System* (January 2009).

[3](#)

Id. at 158.

[4](#)

Emphasis by the Third Circuit, quoting its earlier opinion in *U.S. v. Serafini*, 233 F3d 758 (CA-3, 2000).

[5](#)

Quoting *U.S. v. Harpst*, 949 F2d 860 (CA-6, 1991).

[6](#)

See Toscher, "Sentencing Discretion in Criminal Tax Cases—Where We Have Been and Where We Are," 9 J. Tax Prac. & Proc. No. 6 (Dec. 2007-Jan. 2008); Sandick, "*Gall* and *Kimbrough* and Their Relevance to Sentencing in White-Collar Cases," 20 Fed. Sentencing Rptr. No. 3 (Feb. 2008).

[7](#)

The Comprehensive Crime Control Act of 1984, P.L. No. 98-473, section 217(a) (codified as amended at 28 U.S.C. sections 991-998 (Supp. IV 1986)).

[8](#)

See, Stith and Koh, "The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines," 28 Wake Forest L. Rev. 223 (1993).

[9](#)

Breyer, "The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest," 17 Hofstra L. Rev. 1 (Fall 1988).

[10](#)

Commission statistics indicated that courts granted probation to white-collar offenders more frequently than to

other types of offenders, and if a prison term was ordered, the terms were less severe than for other types of offenders. *Id.*

[11](#)

Id. See also Hofer and Allenbaugh, "Perspectives on the Federal Sentencing Guidelines and Mandatory Sentencing: Article: The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines," 40 Am. Crim. L. Rev. 19 (2003).

[12](#)

Quoting from the Brief for Federal Public and Community Defenders et al. as *Amici Curiae*, page 16.

[13](#)

Transcript of Oral Argument, Dkt. No. 05-4997 (CA-3, argued 11/19/08), page 11. See also pages 61-63 ("there are a lot of other factors that come into play here").

[14](#)

Quoting Levinson, 102 AFTR 2d 2008-6259, 543 F3d 190 (CA-3, 2008).

[15](#)

Nancy Gertner, U.S. District Judge for the District of Massachusetts, "*Gall, Kimbrough and Me*," OSJCL *Amici: Views From the Field* (January 2008), at osjcl.blogspot.com.

[16](#)

Id.

[17](#)

"Wesley Snipes Gets 3 Years for Not Filing Tax Returns," New York Times Regional Newspapers, 4/25/08, at www.nytimes.com/2008/04/25/business/25snipes.html.

[18](#)

See note 2, *supra*. See also "No More Room, No More Money," *The Economist*, 5/21/09.