

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-9146
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JIMMIE F. SMITH, II, and
GLEN P. WILCOXSON,

Defendants-Appellants.

Appeals from the United States District Court for the
Northern District of Texas
(6:91-CR-035-2)

(July 28, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

In this tax evasion case, the appellants failed to report as income \$1,156,000, which was deposited into a three-tier trust scheme involving domestic and off-shore trusts. At trial, there was testimony that, of that amount, only \$482,656.38 was unreported taxable income and \$172,721.37 was owed in taxes. The appellants

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

were convicted, and, on appeal, we reversed the convictions for money laundering and remanded the case for re-sentencing. U.S. v. Smith, No. 92-1612 (August 11, 1993, 5th Cir.) (unpublished).

At resentencing, the district court applied U.S.S.G. §2T1.1(a)¹ that provides:

(a) Base Offense Level: Level from §2T4.1 (Tax Table) corresponding to the tax loss.

For purposes of this guideline, the "tax loss" is the greater of: (A) the total amount of tax that the taxpayer evaded or attempted to evade; and (B) the "tax loss" defined in §2T1.3.

"Tax loss" is defined in §2T1.3 as:

28 percent of the amount by which the greater of gross income and taxable income was understated plus 100 percent of the total amount of any false credits claimed against tax.

Applying these guidelines, the district court calculated the "tax loss" as 28 percent of \$1,156,000, the amount by which gross income was understated. The appellants, however, contend that the base offense level should have been calculated using the actual tax evaded, \$172,721.37.²

On appeal, we will uphold a sentence unless the defendant demonstrates that it was imposed in violation of law, is the result of an incorrect application of the guidelines or was outside the applicable guideline range and was unreasonable. United States v.

¹The 1991 Sentencing Guideline Manual was used at sentencing and all references to the Guidelines are to that version.

²Under U.S.S.G. §2T4.1, the difference is one base offense level.

Parks, 924 F.2d 68, 71 (5th Cir. 1991). We interpret the application of the guidelines de novo. United States v. Carreon, 11 F.3d 1225, 1230 (5th Cir. 1994).

The appellants argue that the comments to the guidelines establish that the definition of "tax loss" under §2T1.3 is an alternative that should only be used when the actual amount of tax evaded is not available or is difficult to calculate. The applicable guideline, §2T1.1, however, unequivocally directs the district court to calculate the base offense level based on the greater of the actual tax evaded or 28 percent of the understated gross income. The guideline is clear; all the district court need do is calculate the two amounts and determine which is the greater. According to the appellants' argument, however, the district court must further examine the circumstances of the offense to determine which amount is appropriate. This construction is inconsistent with the clear language of the Guideline. "In such circumstances, we follow the Guidelines." United States v. Ashburn, 20 F.3d 1336, 1340 (5th Cir. 1994).

For these reasons, the judgment is

A F F I R M E D.