

CONFORMING SOPHISTICATED CONCEALMENT TO THEFT AND TAX

Synopsis of Proposed Amendment: At the April 7, 1998 Commission meeting, the Commission passed an amendment that added a new enhancement to the fraud guideline, which, among other things, provided a two-level increase for sophisticated concealment. The following proposed amendments generally conform the theft and tax guidelines with that portion of the sophisticated concealment amendment.

Please note that there are two options presented with respect to sophisticated concealment in the tax guidelines. Both options address a circuit conflict regarding whether the enhancement applies based on the personal conduct of the defendant or the overall offense conduct for which the defendant is accountable. The amendment proposes the latter view because that view appears more consistent with the usual relevant conduct rules.

In addition to resolving the circuit conflict, option 1 makes minor, non-substantive changes in the commentary to §2T1.1 (Tax Evasion), §2T1.4 (Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud), and §2T3.1 (Evading Import Duties), but otherwise maintains the current enhancement as “sophisticated means.” This option also proposes to add a floor offense level of level 12.

Option 2 generally conforms the enhancement to the definition of sophisticated concealment contained in the amendment passed at the April 7, 1998 meeting. This option also proposes to add a floor offense level of level 12, and as stated above, addresses the circuit conflict.

(A) Addition of "Sophisticated Concealment" Enhancement to Theft Guideline:

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property

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(b) Specific Offense Characteristics

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(5) If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

~~(5)~~(6) * * *

~~(6)~~(7) * * *

~~(7)~~(8) * * *

Commentary

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Application Notes:

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17. For purposes of subsection (b)(5), "sophisticated concealment" means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.

(B) Modification of "Sophisticated Means" enhancement in the tax guidelines :

Option 1:

§2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

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(b) Specific Offense Characteristics

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(2) If sophisticated means were used to impede discovery of the ~~existence~~ offense or its extent of the offense, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

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Commentary

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Application Notes:

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4. "Sophisticated means," as used in subsection (b)(2), includes conduct that is more complex or

demonstrates greater intricacy or planning than a routine tax-evasion case. ~~An~~The enhancement would ~~be applied~~apply, for example, where the defendant used offshore if the offense involved the use of foreign bank accounts or foreign transactions, or transactions through corporate shells or fictitious entities, to conceal the offense or its extent.

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§2T1.4. Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud

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(b) Specific Offense Characteristics

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- (2) If sophisticated means were used to impede discovery of the ~~existence~~offense or its extent of the offense, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

Commentary

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Application Notes:

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3. "Sophisticated means," as used in ~~§2T1.4(b)(2)~~ subsection (b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. ~~An~~The enhancement would ~~be applied~~apply, for example, where the defendant used offshore if the offense involved the use of foreign bank accounts or foreign transactions, or transactions through corporate shells or fictitious entities, to conceal the offense or its extent.

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§2T3.1. Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property

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(b) Specific Offense Characteristic

- (1) If sophisticated means were used to impede discovery of the ~~nature or existence of the offense~~offense or its extent, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

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Commentary

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Application Notes:

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3. *"Sophisticated means," as used in subsection (b)(1), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine duty-evasion case. The enhancement would apply, for example, if the offense involved the use of foreign bank accounts or foreign transactions, or transactions through corporate shells or fictitious entities, to conceal the offense or its extent.*

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Option 2:

§2T1.1. **Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents**

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(b) Specific Offense Characteristics

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- (2) ~~If sophisticated means were used to impede discovery of the existence or extent of the offense, increase by 2 levels. If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.~~

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Commentary

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Application Notes:

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4. ~~*"Sophisticated means," as used in subsection (b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells or fictitious entities.*~~

For purposes of subsection (b)(2), “sophisticated concealment” means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.

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§2T1.4. Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud

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(b) Specific Offense Characteristics

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- (2) ~~If sophisticated means were used to impede discovery of the existence or extent of the offense, increase by 2 levels.~~ **If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.**

Commentary

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Application Notes:

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3. ~~“Sophisticated means,” as used in §2T1.4(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells or fictitious entities.~~

For purposes of subsection (b)(2), “sophisticated concealment” means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.

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§2T3.1. Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property

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(b) Specific Offense Characteristic

- (1) ~~If sophisticated means were used to impede discovery of the nature or existence of the offense, increase by 2 levels.~~ **If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.**

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Commentary

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Application Notes:

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3. *For purposes of subsection (b)(1), “sophisticated concealment” means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.*

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