

- (3) If the offense involved willful failure to pay tax, the tax loss is the amount of tax that the taxpayer owed and did not pay.
- (4) If the offense involved improperly claiming a refund to which the claimant was not entitled, the tax loss is the amount of the claimed refund to which the claimant was not entitled.
- (5) The tax loss is not reduced by any payment of the tax subsequent to the commission of the offense.

Commentary

Statutory Provisions: 26 U.S.C. §§ 7201, 7203 (other than a violation based upon 26 U.S.C. § 6050I), 7206 (other than a violation based upon 26 U.S.C. § 6050I or § 7206(2)), and 7207. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Tax Loss.**—“*Tax loss*” is defined in subsection (c). The tax loss does not include interest or penalties, except in willful evasion of payment cases under 26 U.S.C. § 7201 and willful failure to pay cases under 26 U.S.C. § 7203. Although the definition of tax loss corresponds to what is commonly called the “criminal figures,” its amount is to be determined by the same rules applicable in determining any other sentencing factor. In some instances, such as when indirect methods of proof are used, the amount of the tax loss may be uncertain; the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts.

Notes under subsections (c)(1) and (c)(2) address certain situations in income tax cases in which the tax loss may not be reasonably ascertainable. In these situations, the “presumptions” set forth are to be used unless the government or defense provides sufficient information for a more accurate assessment of the tax loss. In cases involving other types of taxes, the presumptions in the notes under subsections (c)(1) and (c)(2) do not apply.

Example 1: A defendant files a tax return reporting income of \$40,000 when his income was actually \$90,000. Under Note (A) to subsection (c)(1), the tax loss is treated as \$14,000 (\$90,000 of actual gross income minus \$40,000 of reported gross income = \$50,000 x 28%) unless sufficient information is available to make a more accurate assessment of the tax loss.

Example 2: A defendant files a tax return reporting income of \$60,000 when his income was actually \$130,000. In addition, the defendant claims \$10,000 in false tax credits. Under Note (A) to subsection (c)(1), the tax loss is treated as \$29,600 (\$130,000 of actual gross income minus \$60,000 of reported gross income = \$70,000 x 28% = \$19,600, plus \$10,000 of false tax credits) unless sufficient information is available to make a more accurate assessment of the tax loss.

Example 3: A defendant fails to file a tax return for a year in which his salary was \$24,000, and \$2,600 in income tax was withheld by his employer. Under the note to subsection (c)(2), the tax loss is treated as \$2,200 (\$24,000 of gross income x 20% = \$4,800, minus \$2,600 of tax withheld) unless sufficient information is available to make a more accurate assessment of the tax loss.

In determining the tax loss attributable to the offense, the court should use as many methods set forth in subsection (c) and this commentary as are necessary given the circumstances of the particular case. If none of the methods of determining the tax loss set forth fit the circumstances of