

## The United States Supreme Court Takes Up Review of Tax Obstruction Case, Marinello v. United States

by Michael J. Engle and Jacquelyn Gordon

The United States Supreme Court recently agreed to review the case Marinello v. United States, 839 F. 3d 209 (2d Cir. 2016), in order to address a split among various federal circuits regarding the requirements of the omnibus clause of Section 7212 of the Internal Revenue Code, which criminalizes, in part, the obstruction or impediment of the due administration of the Internal Revenue Code. Omnibus clauses are catchall provisions enacted to ensure that crimes not specifically contemplated in the law are covered. The breadth of their reach is both valuable to government tax enforcement and perilous for the alleged tax violator, often relying upon prosecutorial discretion in order for them to be appropriately applied on a case-by-case basis.

For approximately 20 years, Carlo J. Marinello owned and operated a freight service business, transporting items between the United States and Canada. During that time, Marinello neither kept corporate books nor records, even shredding bank account statements and customer receipts while failing to file personal and corporate income tax returns, despite being told to file such returns by an accountant and a lawyer. Marinello also commingled business income with his personal income and used business income to pay off personal expenses. Following an investigation by the IRS, Marinello was charged and convicted (and subsequently sentenced to three years in prison) on several tax-related offenses for the 2005-2008 tax years, one of which was a violation of the omnibus clause of Section 7212 of the Internal Revenue Code, a felony. The omnibus clause of Section 7212 imposes criminal liability on an individual who “in any other way corruptly ... obstructs or impedes, or endeavors to obstruct or impede, the due administration of [the Internal Revenue Code].” The government provided eight means by which Marinello violated this statute: (1) failing to maintain corporate books and records; (2) failing to provide his accountant with complete and accurate information to file returns; (3) destroying, shredding and discarding business records; (4) cashing business checks; (5) hiding business income in personal accounts; (6) transferring assets to a nominee; (7) paying employees with cash; and (8) using business income to pay personal expenses.

Marinello’s primary appellate challenge to his conviction under Section 7212 focused on the fact that the “due administration of the [Internal Revenue Code]” requires a pending IRS action of which he was aware and with which he knowingly interfered, a requirement that the U.S. Court of Appeals for the 6th Circuit imposed in a similar case by comparing the construction of Section 7212 to the general obstruction of justice statute. Marinello asserted that he was not aware of the IRS’s investigation into him or his business until after the conduct that led to the instant charges had already occurred. The district court and the 2nd Circuit Court of Appeals, which followed the 1st, 5th, 9th and 10th Circuits, failed to require that knowledge of a pending IRS action is an element of the crime, thus leaving a wide range of acts open to prosecution, regardless of the taxpayer’s intent. As such, the

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federal circuits are split and the Supreme Court must now settle the issue.

In his petition to the Supreme Court, Marinello argued that without restricting the omnibus clause to pending IRS actions of which the taxpayer is aware, or otherwise limiting its breadth, a taxpayer could be charged with and convicted of acts that are legal, such as not maintaining adequate business records. Additionally, tax crimes that are misdemeanors, such as willfully failing to pay taxes, could be charged under the omnibus clause instead of the specific statute, which would convert the illegal acts to felonies. Further, tax crimes that are felonies, such as tax evasion and tax fraud, that are charged under the omnibus clause instead of the specific statute may result in different sentences for taxpayers. The government, however, maintains that the omnibus clause should not be limited to pending IRS actions, because the IRS is responsible for administering the Internal Revenue Code in ways that do not include any particular proceedings, such as ascertaining individuals' income, and computing, assessing and collecting income taxes, and such administration is "continuous, ubiquitous, and universally known to exist."

In order to protect yourself in this uncertain enforcement climate, both individuals and businesses should have or



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immediately put in place certain best practices to avoid mistakes and an inadvertent violation of the tax laws, such as (a) maintaining adequate personal or business records, including receipts and financial records; (b) avoiding the comingling of funds by keeping separate bank accounts for personal and business income; (c) engaging a tax professional to prepare and file all federal, state and local tax returns for employment taxes as well as income taxes; (d) maintaining an open dialogue with and oversight of internal and external tax professionals; and (e) consulting with a qualified tax professional or lawyer if ever contacted by the IRS.

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