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The United States Supreme Court Narrows Tax Obstruction Statute, Marinello v. United States Follow-Up

by Michael J. Engle and Jacquelyn Gordon

The United States Supreme Court recently issued its holding in *Marinello v. United States* (https://www.supremecourt.gov/opinions/17pdf/16-1144_p8k0.pdf), 121 AFTR 2d 2018-1053 (S. Ct. 2018), 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 IRS. The U.S. Supreme Court, in a 7-2 opinion, overturned the 2nd Circuit's affirmation of Carlo J. Marinello's conviction and three-year prison sentence pursuant to the omnibus clause, finding that a defendant must be aware of a pending tax-related proceeding, such as a particular investigation or audit, or could reasonably foresee that such proceeding would commence. However, the Court's decision specifically excludes from this calculus the "day-to-day work carried out in the ordinary course by the IRS, such as the review of tax returns." Therefore, the government must be able to prove more than a defendant's mere understanding that the IRS reviews tax filings. This decision clearly places the burden on the prosecution to establish that a taxpayer had actual knowledge of a tax proceeding, investigation or audit being directed against that individual.

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 to be appropriately applied on a case-by-case basis. With the new limitations placed on Section 7212 prosecutions, the breadth of the omnibus clause is now limited, thereby making it more difficult for the IRS and the Department of Justice to secure tax convictions for conduct that allegedly is designed to obstruct or impede the taxing function of the government.

As noted in our prior coverage of this case, Carlo J. Marinello owned and operated a freight service business, transporting items between the United States and Canada, during which time he kept inadequate business records, comingled personal and corporate funds, and failed to file personal and corporate income tax returns (against the advice of an accountant and lawyer). Following an investigation by the IRS, Mr. Marinello was charged and convicted (and subsequently sentenced to three years in prison) on several tax-related offenses for the 2005-2008 tax years, including a felony – the violation of the omnibus clause of Section 7212 of the Internal Revenue Code. 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 Mr. Marinello allegedly 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.

The Supreme Court, however, adopted the position taken by Mr. Marinello, who relied on a 6th Circuit case similar to his, and found that its previous holding in *United States v. Aguilar*, 515 U.S. 593 (1995), was applicable here. In *Aguilar*, the Court reviewed an omnibus clause in the federal criminal code that related to actions obstructing or impeding the "due administration of justice," and held that a defendant was in violation of that statute if the defendant's actions had a relationship to a judicial proceeding. The Court provided two reasons for exercising restraint in "assessing the reach of a federal criminal statute": (1) a deference to the prerogatives of Congress, and (2) a fair warning to taxpayers of what the law intends to do if a certain line is crossed. Taking the same two-pronged approach, the Court reasoned that a qualification should be read into this tax statute as well because the language of the statute is broad, which "would also risk the lack of fair warning and related kinds of unfairness" to taxpayers. The Court noted that there are already several provisions in the Internal Revenue Code providing misdemeanor or felony treatment for specific violations, which arguably could be distorted under this section. Additionally, the Court provided that it could not rely on prosecutorial discretion to limit the application of Section 7212, because doing so "could result in nonuniform execution."

Despite this victory for the taxpayer, both individuals and businesses must act to protect themselves from tax enforcement actions by immediately implementing certain best practices in order to avoid mistakes that may be viewed by the government as a violation of the tax laws. Such best practices include but are not limited to (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; and (d) maintaining an open dialogue with and oversight of internal and external tax professionals. If you are ever contacted by the IRS, you should consult with a qualified tax professional or lawyer immediately; and in the event you become aware of a government investigation focusing on your personal or business tax practices, you should seek legal advice from experienced tax and white-collar criminal defense counsel.

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