First Application of *Marinello* on Tax Obstruction

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We recently examined *C.J. Marinello* [138 SCt 1101 (Mar. 21, 2018)], in which the Supreme Court limited the scope of criminal tax obstruction under Code Sec. 7212(a). The Court focused on the so-called "Omnibus Clause," which provides that anyone who "corruptly … obstructs or impedes, or endeavors to obstruct or impede, the due administration of [the Code]" can be fined and imprisoned for up to three years. [*See generally* Donald P. Board, **Marinello** *Limits Tax Obstruction—Are* **Klein** *Conspiracies Next?*, THE M&A TAX REPORT 1 (June 2018).]

In *Marinello*, the Supreme Court held that the Omnibus Clause does not apply unless the defendant's conduct is directed at a *pending*—or at least *reasonably foreseeable*—administrative proceeding. Taxpayers who take actions that are designed to obstruct the IRS in some still-unspecified *future* audit or investigation need not worry about Code Sec. 7212(a). As usual in tax, it pays to plan ahead.

Nothing in Justice Breyer's opinion suggests that the Court had much sympathy for Mr. Marinello. He had, after all, spent almost two decades failing to file returns, dealing in cash, and destroying business records. But the Court was willing to put that aside for the sake of its long-term project of rationalizing—and reining in—the jumble of federal obstruction statutes, of which Code Sec. 7212(a) is just one example.

Second Circuit Gets a Second Shot

In *Marinello*, the Supreme Court reversed the Second Circuit, which had upheld the taxpayer's conviction under the Omnibus Clause [*see* CA-2, 855 F3d 455]. It did not take long for the lower court to get with the program. On May 9, the Second Circuit vacated the unrelated conviction of a rogue return preparer under Code Sec. 7212(a). [*See S. Gentle*, CA-2, 121 AFTR 2d 2018-1681, 721 Fed Appx 91.]

Samuel Gentle ran a tax-preparation business in Mount Vernon, New York. From 2010 to 2014, he prepared an average of 3,200 individual returns per year. The IRS noticed that an awful lot of them included fabricated or inflated deductions for business expenses, charitable gifts, or unreimbursed employee expenses.

The IRS sent an undercover agent to pose as a client. The agent provided Mr. Gentle with a Form W-2 showing income from wages. He did not provide Mr. Gentle with any records or other information that could be used to support deductions.

After speaking briefly with the agent, Mr. Gentle prepared the return. Unprompted, he cooked up a number of fake business expenses and charitable gifts. He then filed the return, fraudulently claiming a refund.

The agent's experience was consistent with the testimony of a number of Mr. Gentle's real-life clients. Mr. Gentle had included similar deductions in their returns. But they had not provided him with any information that would support the deductions claimed.

A jury convicted Mr. Gentle of (1) one count of corruptly obstructing the IRS's administration of the Code in violation of Code Sec. 7212(a); and (2) 38 counts of willfully assisting in the preparation of false or fraudulent tax returns in violation of Code Sec. 7206(2). The U.S. District Court fined Mr. Gentle $125,000 and sentenced him to 51 months' imprisonment—36 months for obstruction, and 15 months for each of the 38 false or fraudulent returns (to be served concurrently).

Mr. Gentle's appeal was pending when the Supreme Court handed down its decision *Marinello*. The Second Circuit promptly vacated Mr. Gentle's conviction under Code Sec. 7212(a). The government had not even tried to show that Mr. Gentle's conduct was directed at a pending or foreseeable administrative proceeding.

The Second Circuit remanded the case to the District Court to resentence Mr. Gentle *de novo* on the 38 counts of assisting in the preparation of a false or fraudulent return. The Second Circuit commented that the trial judge could not *automatically* re-impose a 51-month prison sentence. But if the judge decided to do so after reviewing the evidence and giving the matter some thought, that would be okay.

Any Real Harm Done?

Viewed from the perspective of tax administration, *Marinello* seems questionable. Why immunize conduct (*e.g.*, shredding business records) that is intended to obstruct the IRS a few years down the road? But *Gentle* shows us the other side of the coin.

The indictment in *Gentle* did not allege any conduct intended to obstruct the IRS *except* for the preparation and filing of false or fraudulent tax returns. There is no denying that the bogus returns were intended to obstruct the IRS's administration of the Code. So, Mr. Gentle's conduct fell within the literal scope of the Omnibus Clause.

However, it was not necessary to go after Mr. Gentle using Code Sec. 7212(a). Under Code Sec. 7206(2), it was already a felony to assist in the preparation or filing of false or fraudulent returns. In fact, Mr. Gentle was convicted on 38 counts of doing just that.

When a defendant's misconduct can be prosecuted using a more targeted provision, applying *Marinello* does not blow a hole in the system of tax administration. It simply blocks duplicative charging under a statute that was probably not intended to reach such conduct in the first place.

Perhaps the prosecutors were hedging their bets. To convict under Code Sec. 7206(2), the

prosecution must prove, beyond a reasonable doubt, that the defendant acted *willfully*. Under Code Sec. 7212(a), it is enough to show that the defendant acted corruptly, which is understood to be a less demanding standard.

Of course, the prosecution may have thrown the book at Mr. Gentle simply because it could. It is not unknown for prosecutors to "overcharge" to get maximum leverage against a defendant. That can be useful for the purpose of negotiating a plea or getting the defendant to cooperate in a related investigation.

Criminal tax prosecutions also have a large *in terrorem* component. Piling on the charges—and potentially the sanctions—adds weight to the press release that inevitably follows a conviction. With Congress refusing to provide resources for enforcement, the IRS has to come down hard on the defendants it can afford to pursue.

DOJ Looks Ahead

The government is already adapting to *Marinello*. At a conference in June, Richard Zuckerman, principal deputy assistant attorney general in the Tax Division of the Department of Justice, told practitioners that the DOJ will be taking "a very conservative position on what type of 7212 cases we will authorize."

Mr. Zuckerman said there will still be opportunities to bring charges under the Omnibus Clause, *e.g.*, if someone who has been served with a subpoena starts shredding documents. The DOJ will also be exploring the circumstances in which an audit or targeted investigation is "reasonably foreseeable," even if nothing is currently pending. For example, is the Supreme Court's standard met if the defendant learns that his business partner, or perhaps his local competitors, have been subpoenaed?

Mr. Zuckerman assured his audience that the DOJ will approach these borderline situations cautiously. But wherever the government draws the line, defense counsel will obviously insist on testing it under *Marinello*. So, we should expect the courts to be wrestling with the "reasonably foreseeable" standard for years to come.