

Five Years Since *Marinello v. United States*

Title 26, United States Code Section 7212, criminalizes attempts to interfere with the administration of the internal revenue laws. 26 U.S.C. § 7212. Section 7212(a) contains what is referred to as the “Omnibus Clause,” which prohibits corrupt endeavors to obstruct or impede the due administration of the internal revenue laws. Historically, the Omnibus Clause was a valuable tool for the government. It allowed prosecutors to charge individuals who were motivated to obstruct the IRS from doing its job but who, for whatever reason, had not yet come under IRS scrutiny. It also allowed prosecutors to charge individuals whose obstructive conduct was clearly directed at the IRS but was not clearly intended to obstruct a particular IRS proceeding. On March 21, 2018, the Supreme Court significantly curtailed one of the government’s valuable tools, holding that, in a prosecution under Section 7212(a)’s “Omnibus Clause,” the government must prove that (1) there was a targeted administrative action known to or reasonably foreseeable by the defendant at the time of the obstructive conduct, and (2) there was a “nexus” between the obstructive conduct and the pending or foreseeable administrative action. *Marinello v. United States*, 138 S. Ct. 1101, 1110 (2018).

Following the Court’s ruling, it was immediately apparent that the additional proof requirements of offense would limit the government’s ability to charge Section 7212(a) in certain circumstances and would provide defendants with additional defenses to future or currently pending charges. See Sheena Foye and James Wyrsh, *The Impact of the Marinello Decision on Prosecutions for Obstructing the IRS*, AmericanBar.org, <https://www.americanbar.org/groups/litigation/committees/criminal/practice/2019/impact-of-the-marinello-decision-on-prosecutions-for-obstructing-the-irs/> (last visited February 6, 2023). The Court’s decision also brought a number of questions, including: (1) do these additional “elements” need to be specifically alleged in the indictment; (2) what types of proceedings

constitute “targeted” action by the IRS; (3) how should the trial court instruct the jury on these additional “elements”; (4) would *Marinello*’s reasoning be extended to other tax and non-tax-related criminal statutes; (5) how would *Marinello* impact cases currently pending; and (6) what effect would *Marinello* have on future Section 7212(a) prosecutions. Having been nearly five years since the decision in *Marinello* was announced, some of these questions have been answered some remain uncertain. This article explores the areas where *Marinello* did and did not shift the legal landscape and evaluates outstanding questions regarding *Marinello*’s effects that have yet to be resolved.

I. Overview of *Marinello*’s Holding

Section 7212(a) reads, in relevant part:

Corrupt or forcible interference. -- Whoever corruptly or by force or threats of force . . . endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, *or in any other way corruptly* or by force or threat of force . . . *obstructs or impedes, or endeavors to impede, the due administration of this title*, shall . . . be fined . . . , or imprisoned not more than three years or both

26 U.S.C. § 7212(a). The statute’s prohibition on corruptly or forcibly attempting to interfere with the administration of the internal revenue laws can be broken into two clauses. Criminal Tax Manual (CTM) § 17.02, *available at* <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0> (last visited February 14, 2023). The first clause, known as the “Officer Clause,” prohibits corrupt, threatening, or forcible endeavors to interfere with federal agents acting in an official capacity under Title 26. *Id.* The second clause, known as the “Omnibus Clause,” prohibits acts that obstruct the “due administration” of the Internal Revenue Code. *Id.*

The Supreme Court in *Marinello* considered the scope of the Omnibus Clause in the case of a defendant, Carlo Marinello, charged with obstructing the IRS by (1) failing to maintain corporate books and records; (2) failing to provide his accountant with complete and accurate

information; (3) destroying, shredding, and discarding business records; (4) cashing business checks; (5) hiding business income in non-business bank accounts; (6) transferring assets to a nominee; (7) paying his employees in cash; and (8) using business proceeds to pay for personal expenses. See *United States v. Marinello*, No. 12-CR-53S, 2015 WL 13158491, at *3 (W.D.N.Y. June 26, 2015), *aff'd*, 839 F.3d 209 (2d Cir. 2016), *rev'd and remanded*, 138 S. Ct. 1101 (2018). The defendant argued that the trial court erred in refusing to instruct the jury that the government must prove that the defendant was aware of the proceeding that he was charged with obstructing. The Second Circuit affirmed the defendant's conviction and the Supreme Court reversed. *Marinello*, 138 S. Ct. at 1104.

In reversing the Second Circuit's judgment, the Court held that the Omnibus Clause only prohibited "specific interference with targeted governmental tax-related proceedings, such as a particular investigation or audit," as opposed to "routine administrative procedures that are near universally applied to all taxpayers, such as the ordinary processing of income tax returns." *Marinello*, 138 S. Ct. at 1104, 1107. The Court added that, the government must prove, as elements of the offense, (1) that there was a "nexus" between the defendant's conduct and the targeted governmental tax-related proceeding, which the Court defined as a relationship in time, causation, or logic between the defendant's conduct and the underlying proceeding, and (2) that the proceeding "was pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant." *Id.* at 1109-1110.

II. *Marinello*'s Effects

A. Indictment

1. Actions Pending

One of the first questions that arose after *Marinello* is whether the additional two “elements” of the offense needed to be specifically alleged in the indictment. The Eight Circuit answered in the negative, holding that an indictment that tracks the language of the statute, which itself makes no reference to any nexus to a pending proceeding, is sufficient. *United States v. Prelogar*, 996 F.3d 526, 532 (8th Cir. 2021). In so holding, the court noted that *Marinello*'s formulation of the additional “elements” of the offense could be addressed in the jury instructions. *Id.* In the Ninth Circuit, courts have been split. *Compare United States v. Guirguis*, No. CR 17-00487 HG, 2018 WL 5270315, at *3 (D. Haw. Oct. 23, 2018) (“Government not required to allege that there is a nexus between Guirguis’ conduct and a particular administrative proceeding in the Indictment. The Government must prove the nexus at trial.”), *with United States v. Lawson*, No. 316CR00121TMBDMS, 2018 WL 3375170, at *4–5 (D. Alaska July 5, 2018), *report and recommendation adopted*, No. 316CR00121TMBDMS, 2018 WL 3370517 (D. Alaska July 10, 2018) (pending or reasonably foreseeable targeting administrative proceeding and nexus to the alleged obstructive acts must be alleged in the indictment).

It is unlikely that we will have a resolution on this issue any time soon. In its updated version of the Criminal Tax Manual, the Tax Division of the Department of Justice writes, “indictments brought after *Marinello* should, in order to avoid litigation over the sufficiency of an Omnibus Clause indictment, expressly allege the nexus-to-a-pending-or-foreseeable-proceeding requirement.” CTM § 17.04[7]. Thus, future indictments are likely to allege the

nexus and pending proceeding “elements” regardless of whether the government is legally obligated to do so.

2. Future Actions

The government’s policy decision to expressly allege the nexus-to-a-pending-or-foreseeable-proceeding requirement in the indictment will largely avoid *Marinello*-related litigation over the sufficiency of the indictment. However, the government’s policy decision provides additional benefits to the defendant. By having to plead the existence of a nexus to a pending or reasonably foreseeable proceeding, the government is forced to provide the defendant with more targeted (pun intended) allegations relating to the obstructive conduct and the defendant’s knowledge of the pending proceeding which the government believes the conduct was designed to obstruct. This prevents the government from changing positions as the evidence unfolds at trial.

For example, prior to *Marinello*, an individual charged under the Omnibus Clause for using his business bank account to pay for personal offenses may have to wait until trial to learn whether the government was of the belief that such conduct was designed to obstruct IRS examination or collection activities, or both. By having the government plead the additional *Marinello* elements in the indictment, that same individual would now know exactly which proceeding the government intends to prove that the individual obstructed. This provides an opportunity for the defendant to challenge either his knowledge of the pending proceeding or the causal relationship between his conduct and that proceeding. *See, e.g., United States v. Adams*, No. CR 15-44 (JEB), 2019 WL 1746387, at *4 (D.D.C. Apr. 18, 2019) (government failed to prove that defendant prepared a false Form W-4 in connection with his attempts to obstruct an IRS audit, as the Form W-4 related to future tax liabilities and the audit related to past liabilities).

B. “Targeted” Action by the IRS

The Supreme Court provided only two examples of targeted action by the IRS sufficient to satisfy the pending proceeding requirement it announced in *Marinello*: an IRS investigation and an audit. *Marinello*, 138 S. Ct. at 1109. Since then, courts have provided fairly consistent guidance regarding what type of “targeted” action by the IRS falls within the ambit of the statute.

1. IRS Investigations (Criminal and Civil)

As previewed in *Marinello*, it is unsurprising that obstructive conduct in connection with IRS criminal investigations and civil examinations (audits) fall within squarely within the scope of the Omnibus Clause. *United States v. Orrock*, No. 216CR00111JADCWH, 2019 WL 2494556, at *4 (D. Nev. June 13, 2019), *aff’d*, 23 F.4th 1203 (9th Cir. 2022) (obstructive conduct during examination); *United States v. Jackson*, No. 19-4306, 796 F. App’x 186, *187 (4th Cir. Mar. 9, 2020) (same); *United States v. Rankin*, 929 F.3d 399, 406 (6th Cir. 2019) (same); *United States v. Takesian*, 945 F.3d 553, 566 (1st Cir. 2019) (false statements in connection with IRS investigation into money laundering/healthcare fraud); *Platten v. Ortiz*, No. CV 18-17082 (RMB), 2019 WL 6168003, at *8 (D.N.J. Nov. 20, 2019) (false statements during criminal tax investigation); *United States v. Boulas*, No. 17-CR-10351-ADB, 2018 WL 6681790, at *3 (D. Mass. Dec. 19, 2018) (false statements to IRS Criminal Investigation Special Agent during interview, followed by additional obstructive conduct); *United States v. Dimartino*, No. 3:14-CR-175(AWT), 2018 WL 10715418, at *2 (D. Conn. June 26, 2018) (obstructive conduct during examination).

Of these cases, two are worth noting as they highlight the role that Section 7212(a) prosecutions can still play in circumstances where traditional tax offenses may be disfavored. First, in *Orrock*, the defendant was charged with obstructing an IRS examination by, *inter alia*,

submitting a false Offer-In-Compromise (“OIC”). *Orrock*, 2019 WL 2494556, at *4. An OIC, Form 656, is a form that a taxpayer can use to negotiate with the IRS to pay a reduced amount of tax that the individual or entity would otherwise owe. In *Orrock*, the defendant falsely made it appear that he had limited ability to pay his outstanding taxes, making it more likely that the IRS would agree to accept a lower amount and would end its examination and not attempt to collect on the full amount that the defendant owed. The court held that such conduct violated Section 7212(a) because the false OIC was designed to obstruct IRS’s ongoing attempts to assess and collect outstanding taxes from the defendants. *Id.*

Orrock is significant because the charged conduct did not fit neatly into the other traditional felony criminal tax statutes, 26 U.S.C. § 7206(1) (subscribing to false return, statement, or other document), and 26 U.S.C. § 7201 (tax evasion). Section 7206(1) is typically used to prosecute individuals who prepare false tax returns that underreport their taxable income. Although Section 7206(1) would apply in the context of a false OIC, the prosecution may lack jury appeal as it may be difficult to show that the IRS relied on the false information on the form. Similarly, Section 7201 is typically used to prosecute individuals who attempt to hide their income (evasion of assessment of income tax) or hide their assets (evasion of payment of income tax). Although Section 7201 may also apply in the context of a false OIC, the government would need to prove that the false OIC was made with the intent to evade taxes for a particular year (or years) and would need to establish a tax due and owing in each of those years. By prosecuting the defendant under Section 7212(a), the government avoided potential undesirable theories of liability or proof issues associated with other felony criminal tax statutes.

Second, in *Takesian*, the defendant was charged with obstructing an IRS investigation into a third-party entity. *Takesian*, 945 F.3d at 566. During that investigation, the defendant was

specifically informed that he was not under investigation. *Id.* When he made false statements, the government indicted him for obstructing the IRS’s investigation into a third-party entity. *Id.* Like *Orrock, Takesian* is a good example of an instance where Section 7212(a) still serves as a valuable tool for prosecutors in circumstances where traditional felony criminal tax charges lack jury appeal or involve complicated issues of proof.

2. Collections

Courts have also routinely held that IRS collection activity is a targeted IRS proceeding under the Omnibus Clause. *United States v. Brollini*, No. 20-10376, 2022 WL 3359381, at *1 (9th Cir. Aug. 15, 2022); *United States v. Prelogar*, 996 F.3d 526, 533-34 (8th Cir. 2021); *United States v. Scali*, 19-912-cr, 820 F. App’x 23, 29 (2d Cir. July 8, 2020); *United States v. Graham*, 981 F.3d 1254, 1259-60 (11th Cir. 2020); *United States v. Garriss*, No. 4:17-CR-40058, 2022 WL 3211807, at *4 (D.S.D. Aug. 8, 2022); *United States v. Reed*, No. CR 1:20-00066, 2022 WL 1004775, at *4 (S.D.W. Va. Apr. 4, 2022); *United States v. Hansen*, No. 2:16-CR-00534-HCN, 2020 WL 3452641, at *1 (D. Utah June 24, 2020).

Prior to these decisions, which are consistent across the circuits, there was a basis to argue that routine collection activities were not sufficiently targeted enough under *Marinello*. Defendants could point to the fact that IRS collection activities were conspicuously absent from the Supreme Court’s examples of targeted IRS proceedings, which referenced only IRS investigations and audits. *Marinello*, 138 S. Ct. at 1104. Defendants could also point to *Marinello*’s holding that Section 7212(a) “does not cover routine administrative procedures that are near-universally applied,” and argue that certain collection activities are so routine that they fall outside the scope of the proscribed conduct. *Id.* For example, the IRS typically initiates its collection activity through automated mailings, such as the mailing of notices of deficiency to

taxpayers who are delinquent on their payment obligations. A defendant could argue that such mailings are insufficiently targeted such that a defendant's obstructive conduct in relation to the same cannot fall within the scope of the Omnibus Clause.

In light of existing case law, such arguments are likely to fail. Rather, it is growing clear, if not crystal clear already, that the IRS's attempts to collect on taxes that have already been assessed will always constitute targeted action within the scope of Section 7212(a). Like with respect to obstructing IRS criminal investigations and civil examinations, efforts to obstruct IRS collection activity directed to a third party also falls within the scope of the statute. *Garriss*, 2022 WL 3211807, at *4 (obstruction of attempts by IRS to seize land following jeopardy assessment).

3. Summary of “Targeted” Action by the IRS

Though the Supreme Court's reference to “targeted” action by the IRS appeared at first glance to significantly curtail the government from bringing prosecutions under the Omnibus Clause, the reality is that it is not so limited. The IRS generally has three functions (1) civil examination; (2) civil collection; and (3) criminal investigation. Each of these functions has been held to be a targeted action under *Marinello*. Accordingly, so long as the defendant is aware of a pending or reasonably foreseeable action by the IRS to investigate the defendant or attempt to collect on his or her outstanding liabilities, the defendant can be liable under the Omnibus Clause for obstructing such efforts.

C. Jury Instructions

1. Actions Pending

When *Marinello* was decided, there were a number of Section 7212(a) prosecutions that had recently concluded and for which the jury was not properly instructed on the nexus and

pending/foreseeable proceeding elements of the Omnibus Clause. In some circumstances, courts held that the failure to specifically instruct on those elements of the offense was harmless, as the evidence at trial made clear that the defendant's obstructive conduct had a nexus to a pending proceeding of which the defendant was aware. *See, e.g., United States v. Beckham*, 917 F.3d 1059, 1065 (8th Cir. 2019) (based on evidence introduced at trial, no rational jury could find defendant was unaware of an IRS audit at the time of his obstructive conduct, and holding that the obstructive conduct had sufficient nexus to the pending audit); *United States v. Scali*, 820 F. App'x 23, 29 (2d Cir. 2020) (relying on special verdict form in which jury checked that it unanimously found defendant had committed one or more of the obstructive acts after becoming aware of a pending IRS proceeding). In others, the court held that the failure to properly instruct the jury on the "nexus" and pending/foreseeable targeted proceeding requirement constituted an error that effected the defendant's substantive rights and warranted overturning the jury's conviction. *Adams*, 2019 WL 1746387, at *4.

Whether or not the error was harmless turned on the particular facts of the case. However, it appears that the majority of pending prosecutions survived because, even though the jury instructions regarding nexus to a pending or reasonably foreseeable proceeding were lacking, the evidence at trial was not.

2. Future Actions

Though we are five years from *Marinello*, courts continue to evaluate the sufficiency of jury instructions relating to Section 7212(a). As recently as August of last year, the Ninth Circuit affirmed jury instructions that, in order to render a guilty verdict, required the jury to find that "the IRS was conducting a tax related proceeding or action involving the defendant," and that "the defendant knew about the proceeding or action" before he interfered or attempted to

interfere with it.” *United States v. Brollini*, No. 20-10376, 2022 WL 3359381, at *1 (9th Cir. Aug. 15, 2022). The Court affirmed the district court’s rejection of the defendant’s requested instruction that described the pending IRS proceeding as “targeted administrative action such as an investigation or audit.” *Id.* The Court added that, even if the jury instruction were improper, any error was harmless because the trial evidence made it clear that the obstructive conduct related to efforts to obstruct IRS collection efforts. *Id.*

The Criminal Tax Manual provides model jury instruction in light of *Marinello*:

Elements of 7212(a)

Count _____ of the indictment charges the defendant with corruptly endeavoring to obstruct and impede the due administration of the internal revenue laws. In order for you to find the defendant guilty of this charge, the government must prove each of the three following elements beyond a reasonable doubt.

First, the defendant “endeavored,” that is, acted, with the purpose to obstruct or impede the due administration of the internal revenue laws;

Second, the defendant’s actions had the reasonable tendency to obstruct or impede the due administration of the internal revenue laws; and

Third, the defendant’s actions were committed “corruptly.”

Elements of Section 7212(a) – Defined

The term “endeavor” means to knowingly and deliberately act, or to knowingly and deliberately make any effort. The government must prove some affirmative act by the defendant, rather than a mere failure to act. It is not necessary, however, for the government to prove that the endeavor to obstruct or impede was successful.

“To obstruct or impede” means to hinder, block, delay, interfere with, or make progress slow or difficult.

“The due administration of the internal revenue laws” for purpose of Count _____ means a particular tax-related proceeding. Examples would include a criminal investigation of tax crimes, an IRS examination or audit, tax collection

activities, or other targeted tax-related administrative action. But it does not include routine administrative procedures that are near universally applied to all taxpayers, such as the ordinary processing of tax returns. The particular tax-related proceeding must be one that is pending, or at least reasonably foreseeable by the defendant, when the defendant committed the allegedly obstructive act or acts.

The government must prove a “nexus” between the defendant’s obstructive conduct and the particular tax-related action or proceeding. To prove a nexus, there must be a relationship in time, causation, or logic between an alleged obstructive act and the tax-related action or proceeding.

“To act corruptly” is to act with the intent to secure an unlawful advantage or benefit either for one’s self or for another. The act itself need not be illegal as long as the defendant committed it to secure an unlawful benefit for himself or for others.

CTM, Government Proposed Jury Inst. Nos. 26.7212(a)-1 and 26.7212(a)-2 (emphasis added).

The portions highlighted in bold were designed to capture the main pronouncements in *Marinello*. The model instruction largely parrots the wording of *Marinello* except it expands the examples of a tax-related proceeding to include tax collection activities, which is supported by the existing case law cited above. By including the bold section in the “definitions” portion of the jury instruction, the government is attempting to maintain a distinction between the additional elements of proof required by *Marinello* and the underlying elements of the offense, which in the government’s view remains unaffected by *Marinello*.

Although it could be construed as a distinction without a difference, there is value in pushing back on the government’s characterization of the elements of the offense and pushing for the nexus and pending/reasonably foreseeable proceeding elements to be included as separate elements of the offense in the jury instructions. By including them as part of the elements of the offense, it ensures that the jury understands these requirements to be as important as the remaining elements.

D. Impact on Other Statutes

Attempts to apply the reasoning of *Marinello* to limit the scope of other criminal statutes has largely failed.

Courts have consistently held that *Marinello*'s "nexus" requirement does not apply to the following statutes:

- (1) prosecutions for conspiracy to defraud the United States, in violation of 18 U.S.C. § 371. *See United States v. Herman*, 997 F.3d 251, 273–75 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 787 (2022); *United States v. Gas Pipe, Inc.*, No. 19-11145, 2021 WL 1811752 (5th Cir. May 6, 2021), *cert. denied*, 142 S. Ct. 484 (2021); *United States v. Flynn*, 969 F.3d 873, 879–80 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 2853 (2021); *United States v. Atilla*, 966 F.3d 118, 131 (2d Cir. 2020); *United States v. Lucidonio*, No. CR 20-211, 2022 WL 709881, at *3 (E.D. Pa. Mar. 9, 2022);
- (2) prosecutions for obstruction of a pending proceeding, in violation of 18 U.S.C. § 1505, *see United States v. Sullivan*, No. 20-CR-00337-WHO-1, 2023 WL 163489, at *5 (N.D. Cal. Jan. 11, 2023); *see also United States v. Kirst*, 54 F.4th 610, 623 (9th Cir. 2022) (declining defendant's invitation to rely on *Marinello* and holding, under 18 U.S.C. § 1505, that a defendant may be charged with obstructing an agency that lacks enforcement authority over the defendant);
- (3) prosecutions for obstruction of criminal healthcare investigation, in violation of 18 U.S.C. § 1518(a), *see United States v. Luthra*, No. CR 15-30032-MGM, 2018 WL 1783799, at *2 (D. Mass. Apr. 13, 2018);

- (4) prosecutions for destruction, alteration, or falsification of records in federal investigations and bankruptcy proceedings, in violation of 18 U.S.C. § 1519, *see United States v. Scott*, 979 F.3d 986, 992 (2d Cir. 2020); and
- (5) Immigration removal proceedings based on the commission of an offense related to obstruction of justice, which is defined as an aggravated felony in 8 U.S.C. § 1101(a)(43)(S), *see Silva v. Garland*, 27 F.4th 95, 111 (1st Cir. 2022).

The only area where *Marinello* appears to have had an impact outside of Section 7212(a) are in prosecutions for obstructing an official proceeding, in violation of 18 U.S.C. § 1512. *United States v. Montgomery*, 578 F. Supp. 3d 54, 83 (D.D.C. 2021). In *Montgomery*, the defendants were charged with obstructing an official proceeding, namely, the United States Congress' certification of the Electoral College vote in the 2020 presidential election. *Id.* at 58. The court noted the parallel in statutory language to Section 7212(a), citing *Marinello* in support of its holding that the words “obstruct or impede are broad and can refer to anything that blocks.” *Id.* at 70 (cleaned up). Later in the opinion, the court cited *Marinello* for the proposition that Section 1512(c)(2), like analogous obstruction statutes, requires a “nexus” between the defendants' conduct and the proceeding the defendants are charged with obstructing. *Id.* at 83.¹

In a separate prosecution arising out of the January 6, 2021 attack on the United States Capital, a different district judge cited *Marinello* in holding that Section 1512(c)(2) requires a nexus between the defendants' obstructive conduct and the official proceeding that they were charged with obstructing. *United States v. Caldwell*, 581 F. Supp. 3d 1, 32 (D.D.C. 2021),

¹ The court noted that every other circuit to consider the issue (including those that predated *Marinello*) have likewise imposed a “nexus” requirement to Section 1512(c)(2) prosecutions. This indicates that *Marinello*'s holding, though described by the court as “convincing,” was one of many reasons that the court decided to impose a “nexus requirement.”

reconsideration denied, No. 21-CR-28 (APM), 2022 WL 203456 (D.D.C. Jan. 24, 2022).

However, the court declined defendants invitation to impose *Marinello*'s "specific, targeted acts of administration" requirement. *Id.* at 32. The court distinguished Section 1512 from its Title 26 counterpart, noting that the object of Section 1512(c)(2) is defined as an "official proceeding," which is "not nearly as expansive as the 'due administration' of the Internal Revenue Code." *Id.*

The fact that some courts have cited Section 7212(a) in interpreting Section 1512(c)(2) should not be overstated. As those courts indicated, courts generally understood Section 1512(c)(2) to have a nexus requirement pre-*Marinello* such that the Court's holding merely bolstered existing case law in this arena. Aside from these limited examples, *Marinello*'s reasoning was largely cabined within the offense itself and has not had any dramatic effect on the interpretation of other similar statutes.

E. Overall Impact on Then-Pending and Future Tax Cases

1. Actions Pending

Although I have not done a comprehensive analysis of all of the Section 7212(a) pending at the time *Marinello* was decided, an analysis of reported decisions indicate that *Marinello* did not have a profound impact on such cases. As discussed above, with some exception, courts generally held that the failure to allege the additional elements of the offense did not warrant dismissal of an otherwise properly pled indictment. Courts also held, in more circumstances than not, that the court's failure to properly instruct on the additional elements of the offense was harmless in light of the evidence adduced at trial establishing such elements beyond a reasonable doubt. This suggest that the government, with rare exception, was already utilizing Section 7212(a) to punish obstructive conduct aimed at a targeted IRS proceeding, most often IRS civil examination or collection efforts.

That said, for the few instances in which the government charged obstructive conduct unrelated to a pending or reasonably foreseeable targeted IRS proceeding, *Marinello* led to the reversal of convictions and sometimes the dismissal of charges. In some circumstances, where the defendant was charged with other Title 26 violations, the effect of dismissal of the charges was negligible. In others, it led to a complete dismissal of the case or a far more lenient sentence than otherwise applicable.

2. Future Actions

As discussed above, the Criminal Tax Manual guidance ostensibly limits future Omnibus Clause prosecutions to cases in which the government can allege that the defendant's conduct had a nexus to a pending or reasonably foreseeable targeted IRS action of which the defendant was aware. CTM § 17.04[7]. By having to articulate and allege what the government describes as the "nexus-to-a-pending-or-foreseeable-proceeding requirement," prosecutors will be forced to take a closer look at the defendants awareness of pending IRS proceedings and the relationship between the alleged obstructive conduct and that proceeding. In doing so, prosecutors are likely to pass on cases where the government cannot prove the defendant's knowledge of a pending proceeding and/or cannot tie the defendant's conduct to that proceeding.

In this manner, the ripple effect of *Marinello* is felt less in the reported cases the followed the Supreme Court's decision and more in the void of cases were never brought or were charged under a different tax or tax-related offense. Unfortunately, it is impossible to identify the cases that, but for *Marinello*, would have been charged. And there is not, as far as I am aware, data on the government's use of Section 7212(a) since *Marinello*.

Though far from scientific, an analysis of the press releases issued by the Department of Justice, Tax Division (DOJ-Tax) from 2009 to 2022 indicates that DOJ-Tax has decreased its use

of Section 7212(a) to prosecute tax offenders. From 2009 to 2018, DOJ-Tax issued approximately 30 press releases per year that contained the word “obstruct.” In years that followed, the number of press releases involving obstruction dropped (19 in 2019, 12 in 2020, 19 in 2021, and 16 in 2022). This suggests what logically makes sense: *Marinello* limited the scope of conduct for which the government could charge Section 7212(a) and caused a drop in Section 7212(a) prosecutions.

Overall, tax prosecutions in general have declined since *Marinello*. According to United States Sentencing Guidelines sentencing data, there were 421 successful prosecutions for tax offenses in 2021, down from 577 in 2018 and 547 in 2019.² See United States Sentencing Commission Quarterly Data Report at 2 (available at <https://www.ussc.gov/research/data-reports/quarter/quarterly-sentencing-updates>). This paper does not evaluate the causal relationship between *Marinello* and criminal tax violations writ-large and only notes that an apparent decrease in Section 7212(a) prosecutions has coincided with a general reduction in prosecutions for tax offenses over the past few years.

III. Conclusion

With its decision in *Marinello*, the Supreme Court significantly altered the manner in which the government and defense bar viewed charges under the Omnibus Clause of Section 7212(a). Despite its altering of the relevant legal landscape, the fallout from *Marinello* did not result in significant litigation and/or splits in authority. Rather, *Marinello* likely caused prosecutors to take a more circumscribed approach to charging offenses under the Omnibus Clause, which has led to an apparent decrease in prosecution under Section 7212(a). Given

² There were 366 in 2020, but this lower figure is likely the result of the closure of the courts during the pandemic.

existing DOJ-Tax guidance, one can expect the government to continue to review charges under the Omnibus Clause carefully and be open to evaluating why an individual's conduct does not fall within the ambit of the statute.

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