

Tax Prosecutions

Supreme Court to Rule on Conviction for Obstructing IRS

BNA Snapshot

- Government's take on criminal obstruction could implicate sloppy record-keepers
- Criminal, tax practitioners want knowledge, intent requirement for conviction



By Erin McManus

You might want to think again before tossing that receipt or shredding that bank statement. It could be criminal obstruction of a pending IRS action or proceeding—even if you weren't aware of such proceeding.

The U.S. Supreme Court might be troubled with that interpretation, or at least with the difference in opinion on the matter among federal appeals courts, because it agreed on June 27 to consider whether such behavior is obstruction of the administration of federal tax law, even

when the sloppy record-keeper didn't know there was a pending Internal Revenue Service action or proceeding (*Marinello v. United States*, U.S., No. 16-1144, cert. granted 6/27/17).

Carlo J. Marinello II didn't keep very good records of his freight business. He also failed to file tax returns for almost two decades. Marinello isn't challenging his misdemeanor convictions for failure to file—he admitted to that when interviewed by the IRS. However, he is challenging a U.S. Court of Appeals for the Second Circuit decision upholding his felony conviction for obstructing an IRS investigation.

Matthew S. Hellman, co-chair of the appellate and Supreme Court practice at Jenner & Block LLP in Washington, and counsel for Marinello, told Bloomberg BNA that tax practitioners and their generally law-abiding clients should be concerned about this case, because the Second Circuit's ruling “is a boundless interpretation of the tax obstruction statute that goes well beyond what Congress intended.”

Geoffrey M. Davis, co-chair of Jenner & Block's tax practice in Chicago and also counsel for Marinello, told Bloomberg BNA that the statute—tax code Section 7212(a)—is composed of a very detailed piece about serious obstructive behavior, which is followed by a general piece that says “or in any other way corruptly” obstructs administration of the tax code. “The government applies this to throwing away receipts or using cash,” he said.

Davis said the government uses the obstruction statute to charge taxpayers with a felony when a taxpayer's other violations, like Marinello's, were only misdemeanors. The Second Circuit's interpretation makes it easy to get the felony conviction.

Prosecutorial Discretion

Scott A. Schumacher, associate dean and tax professor at the University of Washington School of Law, told Bloomberg BNA that the jury in Marinello's trial was instructed that the failure to keep records was obstruction. “At that point, what isn't obstruction? Is keeping bad records a felony? It really is the discretion of the prosecutors. It's so broad and gives the prosecutor discretion,” he said.

Schumacher and Guinevere M. Moore, a partner at Johnson Moore LLC in Chicago, told Bloomberg BNA that Department of Justice Tax Division prosecutors say that they wouldn't prosecute someone for merely keeping bad records.

However, Moore said, “the issue is they could. It creates opportunity for prosecutorial abuse.” Johnson Moore filed a friend of

the court brief for the American College of Tax Counsel in support of Marinello.

John Vecchione, president and CEO of Cause of Action Institute, told Bloomberg BNA that the rule of lenity should be applied to the general piece, or residual clause, that the government is broadly interpreting. The rule of lenity requires that an ambiguous criminal statute be interpreted in favor of the defendant. Cause of Action co-filed a friend of the court brief with the National Association of Criminal Defense Lawyers in support of Marinello.

Vecchione said both organizations “have an interest in preventing over-criminalization. We support a mens rea requirement—if you’re convicted of violating the law, you should know you were violating the law.”

Moore said, “with a tax crime, the government must prove intentional violation of a known legal duty, and this case turns that requirement on its head.”

The Second Circuit followed similar rulings by the First, Ninth, and Tenth Circuits. Those courts’ interpretation of the statute conflicts with that of the Sixth Circuit, which has held that a defendant may not be convicted under the residual, catch-all, or “in any other way” clause of Section 7212 unless “he is acting in response to some pending IRS action of which he is aware.”

The Department of Justice Tax Division didn’t respond to a request for comment.

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For More Information

The petition for certiorari is at <http://src.bna.com/qhJ>.

For More Information

Additional information is available in Bloomberg BNA’s Supreme Court Docket Watch: 2016-17 Term Tax Law Cases.