Obstruction and Obscenity: "I Know It When I See It"

*By Jenny L. Johnson Ware**

Jenny Johnson Ware describes the difficulty in defining obstruction in light of the *Marinello* case scheduled to be heard by the Supreme Court later this year.

Supreme Court Justice Potter Stewart authored one of the most famous phrases in U.S. jurisprudence in describing his test for obscenity:

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*, and the motion picture involved in this case is not that.[1]

Although the courts have not been quite as candid in acknowledging their inability to articulate intelligible boundaries for criminal obstruction of the internal revenue laws, recent court opinions, prosecutorial policies, and charging decisions leave taxpayers and their advisors wondering if there are any articulable and objective limits on the omnibus clause of Code Sec. 7212(a), or whether the only standard is that prosecutors and courts claim to know obstruction when they see it.

The omnibus clause of Code Sec. 7212(a), which was enacted with the Internal Revenue Code ("the Code") of 1954, makes it a felony to "in any other way corruptly … obstruct[] or impede[], or endeavor[] to obstruct or impede the due administration of this title … " The statutory language is so broad that the government chose not to use this weapon in its enforcement arsenal for over 25 years after it was enacted. In the first reported appellate decision interpreting Code Sec. 7212(a), the court noted that it could find no other cases brought by the government under this provision and would, therefore, "proceed cautiously where for over twenty-five years the Government has feared to tread." In *Williams*,[2] the government acknowledged that it had previously asserted that Code

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Sec. 7212 applied only to situations involving force or threats of force but characterized that position as "timid" and sought a more expansive interpretation of the statute. The court agreed that what is now referred to as the "omnibus clause" of Code Sec. 7212(a) has a broader reach than only conduct involving force or threats of force, dismantling the first of many potential limitations on the scope of this crime.

The Government is no longer timid in its interpretation of Code Sec. 7212(a), and the courts are no longer proceeding cautiously. As interpreted by prosecutors who are no longer timid, and courts that are no longer cautious, Code Sec. 7212(a) has become an outlier in the federal tax enforcement scheme. Rather than chronologically recount the development of Code Sec. 7212(a) jurisprudence and prosecutorial practices, this article describes the limitations inherent in the other federal tax crimes and then examines each potential limitation on the scope of Code Sec. 7212(a) to discern whether there are any surviving articulable and objective standards that are not readily trumped by the "I know it when I see it" test.

The *Marinello* Case

In a decision that highlights just how far Code Sec. 7212(a) has come since its initial appearance in 1981, the Court of Appeals for the Second Circuit recently rejected two potentially significant requirements that would limit the scope of Code Sec. 7212(a)—the existence of a pending IRS investigation at the time of the allegedly impeding conduct and an affirmative act by the defendant.[3] Although the court "recognize[d] that the scope of omissions on which an omnibus clause violation could be based is not limitless," it made no effort to articulate any intelligible line between sloppy business practices and felony obstruction, instead simply finding that a defendant "surely could be charged under section 7212(a) for … failing to document or provide a proper accounting of business income and expenses."[4] Much like Justice Stewart's conclusion that the motion picture under review in *Jacobellis* was not hard-core pornography, the *Marinello* court simply noted that "[w]hatever those limits may be, the omissions at issue here do not exceed them."[5]

In a sharply worded dissent from the denial of *en banc* review, Judges Jacobs and Cabranes argued that the "panel opinion in *Marinello* affords the sort of capacious, unbounded, and oppressive opportunity for prosecutorial abuse that the Supreme Court has repeatedly curtailed." Indeed, the dissenting judges warned, "[i]f this is the law, nobody is safe."

On June 27, 2017, the Supreme Court granted *certiorari* to consider "[w]hether a conviction under 26 U.S.C. 7212(a) for corruptly endeavoring to obstruct or impede the due administration of the tax laws requires proof that the defendant acted with knowledge of a pending Internal Revenue Service action."[6] The answer to that question—and perhaps the larger question of whether an unbounded reading of the omnibus clause of Code Sec. 7212(a) can survive due process review—will provide important guidance to taxpayers and their advisors in the coming months.

Limitations Inherent in Other Tax Crimes

Federal tax crimes other than Code Sec. 7212(a) share certain attributes that make them part of a coherent enforcement scheme.[7] Each of them requires that the defendant acted willfully, which in the context of tax crimes means the "voluntary, intentional violation of a known legal duty."[8] The tax felonies—tax evasion under Code Sec. 7201, filing a false return under Code Sec. 7206(1), and aiding or assisting in the preparation of a false return under Code Sec. 7206(2)—each require an affirmative act. The common failures—failure to pay tax, failure to file a return, failure to keep records, and failure to supply information—are all misdemeanors under Code Sec. 7203. With limited and well-defined exceptions, a felony prosecution for a federal tax crime is only possible when the government can prove that "the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty" through an affirmative act.[9] A key question in interpreting Code Sec. 7212(a), therefore, is whether Congress intended Code Sec. 7212(a) to be an outlier in the otherwise consistent federal tax enforcement scheme, or whether the concepts of knowledge of illegality and an affirmative act are embedded in the omnibus clause.

Potential Limitations on Code Sec. 7212(a)

Three words or clauses of Code Sec. 7212(a) provide possible limitations on its scope. The omnibus clause applies to anyone who:

(a) corruptly
(b) endeavors to obstruct or impede
(c) the due administration of this title.

In interpreting these provisions, both courts and prosecutors have considered the relationship of Code Sec. 7212(a) to other statutes, such as the more specific tax

crimes described above, the other obstruction statutes in title 18, and the *Klein* conspiracy in 18 USC §371.[10]

Corruptly

The courts generally agree that "[t]o act corruptly means to act with the intent to secure an unlawful benefit either for oneself or another."[11] The acts themselves need not be illegal, so long as the defendant commits them to secure an unlawful benefit.[12] Moreover, the unlawful benefit need not be tax evasion or even a financial benefit of any sort to support a conviction under Code Sec. 7212(a).[13] To determine whether the meaning of "corruptly" provides an intelligible limitation on the scope of Code Sec. 7212(a), it is necessary to understand the relationship of "corruptly" and "willfully" and whether "corruptly" requires knowledge of illegality.

The courts have expressed reluctance "to add the word 'willfully' to section 7212(a), where Congress has seen fit to omit it."[14] The trend, however, seems to be moving toward including the concept of knowledge of illegality in the jury instructions without borrowing the "willfully" terminology from the other federal tax crimes. In *Kelly*, for example, the Court of Appeals for the Second Circuit reviewed the jury instructions and concluded that "the district court's definition of the proof required for the section 7212(a) violation was as comprehensive and accurate as if the word 'willfully' was incorporated in the statute."[15] Similarly, the Court of Appeals for the Tenth Circuit has repeatedly rejected the argument that "'corruptly' has the same meaning as 'willfully,'" but has approved the use of jury instructions that incorporate the concept of knowledge of illegality.[16] In both *Williamson* and *Sorenson*, the courts chose not to decide "whether a conviction under § 7212(a) requires that the defendant knew that the advantage or benefit sought was unlawful," finding instead in *Williamson* that any error in the jury instruction was not "plain," and in *Sorenson* that the enhanced jury instruction given in that case did incorporate a knowledge of illegality requirement.[17]

The district court in *Sorenson* "instructed the jury that to act corruptly, the defendant must have acted '*knowingly and dishonestly*, with the specific intent to gain an unlawful advantage or benefit either for oneself or for another by subverting or undermining the due administration of the internal revenue laws.'"[18] Other circuit courts have also reviewed this instruction—with "knowingly and dishonestly" added to the standard definition of corruptly—and concluded that it requires proof that the defendant knew his actions were unlawful.[19] Defined in this manner, "corruptly" appears to encompass the meaning of "willfully," *i.e.,* a voluntary and intentional violation of a known legal duty, although not doing so explicitly.

It is presently unclear, however, whether the enhanced definition of "corruptly" that includes knowledge of illegality will be adopted uniformly in Code Sec. 7212(a) prosecutions. The "knowingly and dishonestly" language is not included in the government's proposed jury instructions in the Department of Justice's Criminal Tax Manual, and the case law does not definitively require it.[20] It remains to be seen, therefore, whether the term "corruptly" will impose an objective limitation on Code Sec. 7212(a) prosecutions that is consistent with the intent standard required by the other federal tax crimes or whether the government will be allowed to prosecute under Code Sec. 7212(a) when knowledge of illegality is missing.

The Government is no longer timid in its interpretation of Code Sec. 7212(a), and the courts are no longer proceeding cautiously.

Endeavors to Obstruct or Impede

It should come as no surprise that successful obstruction is not required for prosecution under Code Sec. 7212.[21] The key limitation potentially included in this language, therefore, is in the interpretation of "endeavor." The definition of endeavor adopted by the government and the courts seems to require an affirmative act, but the Court of Appeals for the Second Circuit recently disavowed that notion in *Marinello*[22] holding that "an omission may be a means by which a defendant corruptly obstructs or impedes the due administration of the Internal Revenue Code under section 7212(a)." If Code Sec. 7212(a) does not require an affirmative act, the question then becomes whether there are any articulable limits on which omissions are punishable as a felony.

The CTM includes two definitions of endeavor in the proposed jury instructions for use in Code Sec. 7212(a) prosecutions:

> Endeavor means to knowingly and intentionally act or to knowingly and intentionally make any effort which has a reasonable tendency to bring about the desired result.[23]
>
> and

> An endeavor is any effort or any act or attempt to effectuate an arrangement or to try to do something, the natural and probable consequences of which is to obstruct or impede the due administration of the internal revenue laws.[24]

The issue raised by both instructions is whether an omission or failure to act constitutes an "effort" within the definition of endeavor.

The *Marinello* court apparently found that an omission is an "effort" sufficient to qualify as an endeavor because the court cited the first jury instruction, which was given in *Kelly*, as proof that the *Kelly* court did not intend to limit the scope of Code Sec. 7212(a) to affirmative acts when it described the omnibus clause as "render[ing] criminal 'any other' *action* which serves to obstruct or impede the due administration of the revenue laws."[25] The *Marinello* court concluded that "an omission may be the means by which a defendant corruptly obstructs or impedes the due administration of the Internal Revenue Code" based on its reasoning that "a defendant surely could be charged under section 7212(a) for knowingly failing to provide the IRS with materials that it requests, or, as in Marinello's case, for failing to document or provide proper accounting of business income and expenses."[26] Aside from these examples, the *Marinello* court did not attempt to define which omissions are sufficient to qualify as an endeavor under Code Sec. 7212(a) but did at least recognize that "the scope of omissions on which an omnibus clause violation could be based is not limitless."[27]

Much like Justice Stewart's conclusion that the motion picture under review in Jacobellis *was not hard-core pornography, the* Marinello *court simply noted that "[w]hatever those limits may be, the omissions at issue here do not exceed them."*

The unpublished decision from the Court of Appeals for the Tenth Circuit in *Wood* comes closest to defining an articulable and objective limitation on the scope of an endeavor under Code Sec. 7212(a). In *Wood*, the defendant alleged that the jury instructions erroneously allowed the jury to find that his failure to file income tax returns in violation of Code Sec. 7203 was sufficient to convict under Code Sec. 7212(a).[28] The court found that Wood "made a plausible argument" that there was plain error because (1) the willful failure to file tax returns is addressed in a different section of the Code; (2) the government "identified no language in the Code suggesting that the same conduct constituting a violation of § 7203 (a misdemeanor) may also constitute a violation of § 7212 (a felony)"; and (3) the government provided no authority supporting the theory that "the failure to file under § 7203 can constitute a 'corrupt[] endeavor'" under Code Sec. 7212.[29] The court in *Wood*, however, did not decide whether an omission covered by Code Sec. 7203 could constitute an endeavor for purposes of Code Sec. 7212 because it found, instead, that the defendant was unable to show that the potential error was prejudicial when there was strong evidence that the defendant engaged in the other means of obstruction charged by the government.[30]

The CTM suggests that the Department of Justice might agree, as a matter of policy, with the limitation described by the court in *Wood* because it cites *Wood* after delivering an unequivocal instruction that "[p]rosecutors should not charge the failure to file a tax return as an endeavor" under Code Sec. 7212(a).[31] Review of actual cases, however, reveals that the government does not draw a line that excludes omissions covered by Code Sec. 7203 from the scope of corrupt endeavors charged under Code Sec. 7212(a). In direct violation of the instruction in the CTM, the indictment filed in *Torim*[32] in the Southern District of New York in 2014 alleges that the defendant impeded the IRS by, among other things, failing to file individual income tax returns and failing to file corporate income tax returns.[33] Moreover, the omissions covered by Code Sec. 7203 include not only the failure to file a return but also failure to pay tax or estimated tax, failure to keep records, and failure to supply information. The corrupt endeavors alleged in the superseding indictment filed against *Marinello* in October of 2012 included "failing to maintain corporate books and records," which falls squarely within Code Sec. 7203.[34] These are just two recent examples of prosecutors charging omissions that are misdemeanors under Code Sec. 7203 as corrupt endeavors to support a felony conviction under Code Sec. 7212(a), and there are likely more in the pipeline after *Marinello*.

If the definition of "endeavor" required an affirmative act or even if, as suggested by *Wood*, the inclusion of an omission in Code Sec. 7203 created a bar against charging that omission as an endeavor to obstruct in a felony prosecution under Code Sec. 7212(a), there would be some articulable and objective standard guiding Code Sec. 7212(a) prosecutions. As presently interpreted and enforced, however, the word "endeavor" in Code Sec. 7212(a) provides no meaningful limitation on its scope.

Due Administration

Another potential limit on the scope of Code Sec. 7212(a) grew out of the "due administration of this title" language that arguably parallels the "due administration of justice" language in 18 USC §1503. Relying heavily on the Supreme Court's interpretation of Code Sec. 1503 in *Aguilar*,[35] and observing that the omnibus clause in Code Sec. 7212(a) contains language virtually identical to Code Sec. 1503, the Court of Appeals for the Sixth Circuit construed the omnibus clause as requiring proof that a defendant was aware of "some pending IRS action" when he engaged in the potentially impeding conduct.[36] The *Kassouf* court expressed concern that broader application of Code Sec. 7212(a) could "open[] the statute to legitimate charges of overbreadth and vagueness" and reluctance to construe the statute to impose criminal liability on a defendant who "may have no idea that conduct such as the failing to maintain records (before his tax returns were ever filed) might obstruct IRS action because he had no specific knowledge that the IRS would ever investigate his activities."[37]

The following year, a different panel of the Sixth Circuit held that *Kassouf* should be limited to its precise holding and facts, and that Code Sec. 7212(a) may apply to defendants who anticipatorily try to impede the administration of the internal revenue laws before the pendency of any IRS proceeding.[38] In *Bowman*, the defendant was prosecuted under Code Sec. 7212(a) after he attempted to prompt an IRS investigation into several of his creditors by filing forms with the IRS that falsely indicated that his creditors had received taxable income.[39] The court opined that "[a]ll of the reasoning in *Kassouf* supports the conclusion that an individual's deliberate filing of false forms with the IRS specifically for the purpose of causing the IRS to initiate action against a taxpayer is encompassed within § 7212(a)'s proscribed conduct" and differentiated the two cases factually on the grounds that "[t]he filing of false tax forms is not legal when undertaken; it is not speculative; it is specifically designed to cause a particular action on the part of the IRS."[40]

Most recently, the Sixth Circuit found that "although *Bowman* purported to limit *Kassouf* to its facts, it would be more accurate to conclude that the opposite is true."[41] As explained by the court in *Miner*, *Kassouf* "applies to defendants whose conduct in failing to disclose or in peculiarly structuring their income and financial transactions generally makes it more difficult for the IRS to identify and collect taxable funds," while *Bowman* "is reducible to a rule that a defendant who intentionally attempts to instigate a frivolous IRS proceeding cannot claim to have lacked the necessary intent to impede the IRS's administration of its statutory duties with respect to that proceeding."[42] The court found, therefore, that the government erred in characterizing "*Kassouf* as an exception to *Bowman*, rather than the other way around."[43] Having difficulty reconciling the two earlier decisions, the *Miner* court noted that "*Bowman*, in rejecting *Kassouf*'s application to a defendant who was attempting to instigate a frivolous IRS proceeding rather than to impede an existing one, did so primarily because it believed that the indicia of intent to impede were patently obvious."[44] In other words, the objective limit on the scope of Code Sec. 7212(a) articulated in *Kassouf* was valid law, but it could be trumped whenever obviously obstructive conduct fell outside that scope.

Although Code Sec. 7212(a) is not a new statute, the boundaries of its reach are still undefined as prosecutors abandon the objective criteria previously applied in self-restraint and courts grapple with how to read any intelligible limitations into the broad statutory language.

The rule in the Sixth Circuit, therefore, appears to be that the government must prove that the defendant was aware of a specific IRS inquiry into a particular taxpayer at the time of the potentially impeding conduct, unless the conduct at issue is obviously obstructive under the "I know it when I see it" test. The other appellate courts that have considered whether Code Sec. 7212(a) should apply only when there is a pending IRS action have rejected that limitation outright, disagreeing with the analysis in *Kassouf*.[45] This is the precise issue pending before the Supreme Court in *Marinello*, and both taxpayers and their advisors should carefully monitor the outcome of that case to see if the Supreme Court will articulate at least one objective limitation on the scope of Code Sec. 7212(a).

In the meantime, prosecution policies offer no relief from the uncertainty. Prosecution policies have changed to expand the use of Code Sec. 7212(a) in a way that eliminates any limitation derived from when the conduct occurred or whether there was a nexus between the conduct and a pending IRS action. Department of Justice Tax Division Directive No. 77, issued in 1989, stated:

> In general, the use of the "omnibus" provision of Section 7212(a) should be reserved for conduct occurring after

> a tax return has been filed—typically conduct designed to impede or obstruct an audit or criminal tax investigation, when 18 U.S.C. 371 charges are unavailable due to insufficient evidence of conspiracy. However, this charge might also be appropriate when directed at parties who engage in large-scale obstructive conduct involving actual or potential tax returns of third parties.

That directive was superseded in 2004 by Tax Division Directive No. 129, which instead indicates that:

> A § 7212(a) omnibus clause charge is particularly appropriate for corrupt conduct that is intended to impede and IRS audit or investigation … A § 7212(a) omnibus clause charge can also be authorized in appropriate circumstances to prosecute a person who, prior to any audit or investigation, engaged in large-scale obstructive conduct involving the tax liabilities of third parties.

The concept that Code Sec. 7212(a) should be reserved for conduct occurring after a tax return has been filed disappeared entirely from the policy, as did any indecision about whether Code Sec. 7212(a) is an appropriate charge for large-scale obstructive conduct involving liabilities of third parties. Although there is not a subsequent superseding directive, recent cases demonstrate that the government has also done away with any distinction based on the scale of the obstructive conduct or whether it involves liabilities of third parties as opposed to just the defendant taxpayer.[46]

As described in Tax Division Directive No. 77, Code Sec. 7212(a) had intelligible boundaries: it could be used to prosecute obstructive conduct by any person after a return is filed, which by nature typically involves a pending audit or investigation, or to prosecute large-scale obstructive conduct involving the liabilities of third parties, which by nature impacts the administration of the tax laws. In either situation, there is a nexus between the conduct at issue and the due administration of the tax laws that is not speculative. As demonstrated in the official change of policy and actual prosecutions, however, the government no longer recognizes defined categories of conduct where that nexus is either lacking or too speculative to support a felony prosecution.

When the link between the alleged conduct and the due administration of the tax laws becomes too speculative, there is a real question of whether the defendant had the requisite intent to obstruct.[47] Although the concept of nexus is not widely discussed in Code Sec. 7212(a) cases, it appears to be the driving force behind the "I know it when I see it" test. Rather than abandoning any concept of nexus between the conduct and the due administration of the tax laws, it seems that the courts and prosecutors have instead ceased any effort to define the boundaries of when that nexus exists in favor of a case-by-case inquiry.

Conclusion

Although Code Sec. 7212(a) is not a new statute, the boundaries of its reach are still undefined as prosecutors abandon the objective criteria previously applied in self-restraint and courts grapple with how to read any intelligible limitations into the broad statutory language. Challenges to Code Sec. 7212(a) based on unconstitutional vagueness or the rule of lenity unfortunately focus on the particular facts at hand—did the law adequately warn the defendant that the particular conduct alleged in that case was unlawful? These legal standards allow the proliferation of the "I know it when I see it" test, without creating articulable standards that guide taxpayers and their advisors in their business and tax planning, records management, audit preparation, or interactions with the IRS. The Supreme Court may rescue taxpayers and their advisors from this sea of uncertainty when it decides *Marinello*, or it may confirm that no life boat is coming until Congress decides to limit prosecutorial discretion with articulable standards.

ENDNOTES

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1 *Jacobellis v. Ohio*, SCt, 378 US 184, 197 (Stewart, J., concurring) (emphasis added).

2 *R.L. Williams*, CA-8, 81-1 USTC ¶9268, 644 F2d 696, 699, *cert. denied*, SCt, 454 US 841.

3 *C.J. Marinello*, CA-2, 2016-2 USTC ¶50,453, 839 F3d 209, 224.

4 *Id.*, at 224, n 15.

5 *Id.*, at n 15.

6 *Marinello*, No. 16-1144.

7 There are three Code sections that arguably fall outside the general scheme described in this paragraph, but they are each a well-defined and limited exception to the rule. If a person required to collect, account for, and pay over certain taxes fails to do so, and receives a hand-delivered notice of such failure and the requirement to withhold and pay over additional taxes, continued failure to comply subjects the person to prosecution for a misdemeanor under Code Sec. 7215 without specifically requiring proof of willfulness. Although the statute does not use the term willful in describing the elements of the crime, it does create certain defenses that make it difficult to imagine a non-willful violation of Code Sec. 7215. There are also two types of willful failures that are felonies rather than misdemeanors—the willful failure of a withholding agent to collect, account for and pay over tax is a felony under Code Sec. 7202, and the willful failure of a person who is engaged in a trade or business to comply with the currency transaction reporting requirements is a felony under Code Sec. 7203. In this way, the Code distinguishes willful failures by those who are in a special position that requires additional reporting from willful failures by ordinary taxpayers and classifies the latter as misdemeanors.

8 *P. Pomponio*, SCt, 429 US 10, 13, 98 SCt 1521.

9 *Cheek*, SCt, 498 US 199, 201.

10 A *Klein* conspiracy is a conspiracy to defraud the United States by impairing or impeding its lawful governmental functions, named after the leading conspiracy to defraud case in a tax

setting, *H.H. Klein*, CA-2, 57-2 USTC ¶9912, 247 F2d 908, 920, *cert. denied,* SCt, 355 US 924, 78 SCt 365.

[11] *McBride*, CA-6, 362 F3d 360, 372; *see also C. Adams*, CA-1, 2014-1 USTC ¶50,124, 740 F3d 22, 31; *L. Reeves*, CA-5, 85-1 USTC ¶9190, 752 F2d 995, 1001; *J.R. Phipps*, CA-5, 2010-1 USTC ¶50,190, 595 F3d 243, 247.

[12] *G.M. Popkin*, CA-11, 91-2 USTC ¶50,496, 943 F2d 1535, 1537 (creating a corporation for the purpose of enabling a client to disguise the character of illegally earned income and repatriate it from a foreign bank is corrupt); *D.D. Wilson*, CA-4, 97-2 USTC ¶50,618, 118 F3d 228, 234 (backdating documents and using nominees to conceal assets and disguise the nature of income is corrupt).

[13] *P.A. Giambalvo*, CA-8, 2016-1 USTC ¶50,146, 810 F3d 1086, 1099 (holding that "corruptly" is not limited to situations where the defendant wrongfully sought or gained a financial advantage under the tax laws); *Saldana*, CA-5, 427 F3d 298, 305 (same).

[14] *R.H. Kelly*, CA-2, 98-2 USTC ¶50,501, 147 F3d 172, 176.

[15] *Id*.

[16] *J.R. Sorenson*, CA-10, 2015-2 USTC ¶50,478, 801 F3d 1217, 1225 (citing *Williamson*, CA-10, 746 F3d 987, 991–992).

[17] *Williamson,* 746 F3d 992, 993; 801 F3d 1230.

[18] 801 F3d 1230.

[19] *See W.F. Dean*, CA-11, 2007-2 USTC ¶50,536, 487 F3d 840, 853 (noting that the pattern jury instruction for that circuit include the "knowingly and dishonestly" language in the definition of corruptly); *Saldana*, 427 F3d 303.

[20] Criminal Tax Manual, U.S. Dep't of Justice (2012) (last updated January 2016) ("CTM"), *see* Government Proposed Jury Instr. No. 26.7212(a)-6.

[21] *See E.R. Rosnow,* CA-8, 92-2 USTC ¶50,506, 977 F2d 399, 409.

[22] *Marinello*, CA-2, 2016-2 USTC ¶50,453, 839 F3d 209, 225.

[23] Government Proposed Jury Inst. No. 26.7212(a)-3 (citing *Kelly*, CA-2, 98-2 USTC ¶50,501, 147 F3d 172, 177; *Dowell*, 430 F3d 1100, 1110; and *P. Palivos*, CA-7, 2007-1 USTC ¶50,447, 486 F3d 250, 258 (obstruction of justice)).

[24] Government Proposed Jury Inst. No. 26.7212(a)-4 (citing *Frank*, CA-8, 354 F3d 910, 922 (obstruction of justice); *Silverman*, CA-11, 745 F2d 1386, 1396 n 12 (obstruction of justice); and *M. Dykstra*, CA-8, 93-1 USTC ¶50,243, 991 F2d 450, 453 (instruction used but not addressed in court of appeals decision)).

[25] *Marinello,* CA-2, 2016-2 USTC ¶50,453, 839 F3d 224 (quoting *Kelly*, CA-2, 98-2 USTC ¶50,501, 147 F3d 175) (emphasis added).

[26] *Id*.

[27] *Id*., at n 15 (citing *Wood*, CA-10, 2010 WL 2530732, 384 F.App'x 698, 708).

[28] *Wood,* 384 Fed.Appx. 708.

[29] *Id*.

[30] *Id*., at 709–710.

[31] CTM §17.04[2].

[32] *Torim,* 7:14-cr-00238-CS.

[33] *Id*., at Docket No. 2, ¶5(E) and (F).

[34] *Marinello*, CA-2, 2016-2 USTC ¶50,453, 839 F3d 213.

[35] *Aguilar*, SCt, 515 US 593.

[36] *J.J. Kassouf*, CA-6, 98-1 USTC ¶50,437, 144 F3d 952, 957.

[37] *Id.,* at 958.

[38] *D.N. Bowman*, CA-6, 99-1 USTC ¶50,510, 173 F3d 595, 600.

[39] *Id.,* at 599.

[40] *Id.,* at 600.

[41] *D. Miner*, CA-6, 2015-1 USTC ¶50,103, 774 F3d 336, 345.

[42] *Id*., at 343.

[43] *Id*., at 344.

[44] *Id*.

[45] *Wood*, 384 F.App'x 704; *Sorenson*, CA-10, 2015-2 USTC ¶50,478, 801 F3d 1217, 1232; *Floyd*, CA-1, 740 F3d 22, 32, n 4; *S.A. Massey*, CA-9, 2005-2 USTC ¶50,482, 419 F3d 1008, 1010; *Marinello*, CA-2, 2016-2 USTC ¶50,453, 839 F3d 213.

[46] *See, e.g., Sorenson*, CA-10, 2015-2 USTC ¶50,478, 801 F3d 1226–1227 (finding that the limitations in Tax Division Directive No. 129 did not compel reversal of the defendant's conviction under Code Sec. 7212(a) even though the defendant was the taxpayer whose liabilities were at issue rather than a tax professional whose conduct extended to returns of third parties).

[47] *See, e.g., Aguilar*, SCt, 515 US 593, 600 (requiring a nexus between the alleged obstructive act and the investigation or proceeding for purposes of the omnibus clause of Code Sec. 1503).