

## Feds' Plea Leverage At Stake In High Court Tax Dodger Case

By Vidya Kauri

*Law360, New York (December 11, 2017, 9:25 PM EST)* -- The federal government could lose a potentially important bargaining chip during plea negotiations if U.S. Supreme Court justices narrow the application of a statute criminalizing the obstruction of federal tax laws, as they recently indicated they might do during oral arguments in an appeal from a convicted tax dodger.

In the appeal from Carlo Marinello, who was convicted for failing to file personal and corporate tax returns on income from his Buffalo, New York, courier business, the high court appeared to take the position that the government's interpretation of the so-called omnibus clause in Section 7212(a) of the Internal Revenue Code may be too far-reaching, with the potential to indict a significant portion of the American population.

Justice Elena Kagan explicitly said that the statute, which criminalizes the "corrupt or forcible interference" of the administration of tax laws, "is just ungodly broad" while she searched for text in the statute that would allow for a narrower interpretation. Associate Justice Stephen G. Breyer pointed out that the government's reading of the statute could lead to prosecuting "a very significant number of people" who may pay their gardeners and snow shovellers in cash knowing that such cash payments could aid somebody in not declaring their income to the IRS.

The government has contended that tax misconduct occurring before a formal Internal Revenue Service proceeding begins should be punished, while Marinello, whose violations include not keeping financial records, paying employees in cash and using business money personally, has argued that the omnibus clause should only apply to the knowing obstruction of an ongoing IRS investigation.

Although the justices didn't seem to buy that Marinello's position was necessarily the right way to limit the scope of the omnibus clause, Matthew Schwartz, a partner at Boies Schiller Flexner LLP, said that it is now a question of how, and not if, the law will be narrowed.

"Several justices worried that the tax crime at issue in Marinello would turn misdemeanor violations of the tax code — such as failing to file a Form 1099 when you pay a landscaper in cash — into felonies, and that it left prosecutors with far too much discretion," Schwartz said.

The justices were able to begin poking holes in the government's argument by relying on guidance Attorney General Jeff Sessions released in May saying that prosecutors should "charge and pursue the most serious, readily provable offense."

While many tax crimes are misdemeanors, obstruction is a felony and the government did not provide a concrete, bright line to delineate the two. Associate Justice Neil M. Gorsuch questioned if the government was inviting a “vagueness challenge” by not making it clear what activities would qualify under the disputed statute.

“I just wonder, are we going to wind up in the same place, that you drive this thing to such enormous breadth in its interpretation that you're inviting a vagueness challenge at the back end?” he said.

Where Marinello’s position, argued by his attorney Matthew Hellman of Jenner & Block LLP, started to fall apart is where he seemed to be resisting suggestions from justices that the IRS need not be conducting a full-blown audit or investigation, but that it might suffice to have some other affirmative action from the IRS, according to Jeffrey Green, a criminal defense lawyer and partner at Sidley Austin LLP.

“Marinello’s position was it’s got to be a pending proceeding like other obstruction statutes,” Green said, predicting that the court will likely limit the statute to specific actions that the IRS may take, such as letting taxpayers know their files are being examined, in order for felony charges to be triggered.

Such a move could not only overturn Marinello’s three-year prison sentence, but it could also restrict the government’s ability to use Section 7212(a) as a negotiating tool during plea discussions when taxpayers may plead guilty to lesser misdemeanors under the possible threat of a felony charge, experts said.

“If the government can credibly threaten you with a felony charge, then you’re much more likely to plead guilty to a lesser crime,” Green said. “So, it could potentially change the dynamics of the plea negotiations between the government and the defendant.”

Jenny Johnson Ware, a trial lawyer at Johnson Moore and an adjunct professor on the tax faculty at Northwestern Pritzker School of Law, said that the main difference for the government would be that it would have less power to coerce people into pleading guilty to misdemeanors “by trumping up the charges and turning them into a felony.”

However, the government could still carry out criminal prosecutions under other sections of the law, she said.

“So, people would be facing the charges that they rightfully should be facing for the conduct they committed and deciding whether they want to go to trial on those charges or not, without the extra danger of a felony conviction looming in the background,” Johnson Ware said. “So, I think it would actually set things right and put the balance back where it belongs instead of giving the government too much power to coerce guilty pleas.”

The justices may note that the administration of the tax code relies heavily on taxpayers’ voluntary compliance with audit rates being “quite low,” according to Donald Falk, an appellate specialist and partner at Mayer Brown LLP.

“They may require some kind of contact from the government,” Falk said. “It’s not going to be a formal audit ... but they may require some kind of contact, however minor, from someone in Treasury before the statute is triggered. We don’t know exactly where they’re going to draw the line, but it’s going to be

somewhere between the positions of the parties.”

The court will also need to clarify if omissions, such as failing to keep financial records, would constitute a sufficient endeavor to obstruct under the statute or if a more affirmative action by the taxpayer has to take place, Johnson Ware said.

“The way that tax penalties are set up, generally conduct only rises to the level of a felony if it is an affirmative act,” she said. “There are very few omissions that can constitute a felony and those are very specifically and narrowly described. So, it seems unlikely that Congress would want to have such a broad felony as the way the government has been interpreting 7212(a).”

Marinello is represented by Matthew S. Hellman, David Bitkower, Michael Stewart, Geoffrey Davis and Corinne Smith of Jenner & Block LLP, David Strauss and Sarah Kinsky of the Jenner & Block Supreme Court and Appellate Clinic at the University of Chicago Law School, and Joseph M. LaTona.

The government is represented by Solicitor General Noel Francisco of the U.S. Department of Justice.

The case is Carlo J. Marinello II v. U.S., case number 16-1144, in the Supreme Court of the United States.

--Editing by Pamela Wilkinson and Kelly Duncan.