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A Long Overdue Check On Prosecutorial Power In Tax Cases

By **Caroline Rule and Robert Fink** (March 26, 2018, 2:49 PM EDT)

Twenty years ago, we put forward what was then a novel concept — that the IRS and the U.S. Department of Justice were misusing the tax code to make their jobs easier. Our topic was the misuse of a statute that, we contended, was reserved for prosecuting the deliberate obstruction of a specific IRS investigation, audit or collection proceeding, and not for punishing any tax-related misconduct.

In a **June 1998 article** in the Journal of Taxation,[1] we bemoaned prosecutors' growing use of Section 7212(a) of the Internal Revenue Code "like pugnacious children with a dangerous new toy," and we argued that prosecutors' "escalating reliance on [that section] suggest[s] that the statute may expand almost infinitely to reach all misconduct that is in any way tax related." We posited that what is known as the "omnibus clause" of Section 7212(a) — which makes it a felony "corruptly or by force" to "endeavor[] to obstruct or impede, the due administration of this title," i.e. Title 26, the Internal Revenue Code — was not directed at conduct that violated "the monolith of the Service's administration of the Code as a whole."

In fact, we pointed out that the Justice Department's own 1989 guidance explicitly stated that "[i]n general, the use of the 'omnibus' provision of IRC 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 a criminal tax investigation." We also determined that Congress had been "dangerously vague" in drafting the statute, and we suggested that lawmakers should clarify the law to end the growing distortion of what we believed was Congress' original intent.

Congress didn't heed our advice, but last week the U.S. Supreme Court did.

Indeed, on March 21, the Supreme Court **issued its decision in Carlo J. Marinello II v. United States**, determining that the "omnibus clause" of Section 7212(a) "does not cover routine administrative procedures that are near-universally applied to taxpayers, such as the ordinary processing of income tax returns." The court narrowed application of the statute by interpreting it to refer to a "specific interference with targeted governmental tax-related proceedings, such as a particular investigation or audit."

The Supreme Court, albeit in less colorful language than we used back in 1998, has now agreed that the government "used the clause more often after the early 1990's," and that "to rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language places great power in the hands of the prosecutor." The court agreed with us that conduct forbidden by the statute, in the court's language, "does not include routine, day-to-day work carried out in the ordinary course by the IRS, such as review of tax returns. ... Just because a taxpayer knows that the IRS will review her tax return every year does not transform every violation of the Tax Code into an obstruction charge."



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The court in Marinello also agreed with us that a taxpayer would have to *know* of an IRS audit or investigation in order to intend to obstruct or impede it, concluding that, “to secure a conviction under the Omnibus Clause, the Government must show (among other things) that there is a ‘nexus’ between the defendant’s conduct and a particular administrative proceeding, such as an investigation, audit, or other targeted administrative action.” We had argued, in similar language, that the statute was intended to prohibit “conduct that by its very nature must be intended to disrupt particular IRS employees or activities rather than the overall operation of the tax Code.”

This check on prosecutorial power is far overdue. While it is satisfying to be vindicated two decades later, the fact that the law was misused, and the Justice Department was allowed to ignore or expand upon its own guidelines, for more than 20 years, represents justice delayed for many defendants who were ensnared by prosecutors’ overly broad application of the law. To paraphrase what we said back in 1998, just because something makes a prosecutor’s job easier doesn’t make it right or fair.

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[1] The Growing Epidemic of Section 7212(a) Prosecutions – Is Congress the Only Cure?

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