

More *Marinello* Uncertainties Rising to the Surface

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The Supreme Court's recent narrowing of what constitutes tax obstruction has courts wrestling with new issues like when a tax proceeding ends.

In *Marinello v. United States*, [138 S. Ct. 1101](#) (2018), the Supreme Court [narrowed felony tax obstruction](#) under the omnibus clause of [section 7212\(a\)](#) to obstructive conduct connected to either a pending proceeding or one "then reasonably foreseeable by the defendant." Defendants charged with obstruction have since been probing just what this new requirement means.

For example, in *United States v. Prelogar*, [No. 4:17-cr-00248](#) (W.D. Mo. 2018), the defendant asked the court to force the prosecution to meet the new nexus burden with the charges as laid out in the indictment. And in *United States v. Adams*, [1:15-cr-00044](#) (D.D.C. 2019), the court vacated an obstruction conviction because of questionable nexuses for at least some of the identified obstructive conduct.

One of the bases charged in *Adams* involved the defendant's alleged efforts to impede IRS efforts to collect a tax debt with a wage garnishment. The court [questioned](#) how filing a bankruptcy form without that debt would have actually interfered with IRS collection efforts, and also tried to distinguish a tax collection remedy from a pending investigation.

The *Prelogar* case is in pretrial proceedings following the court's refusal to dismiss the charges in the indictment, and the government is considering whether to retry the case in *Adams*.

Practitioners question both the overly broad dismissal of collection efforts as obstructable and the particular obstruction facts presented in *Adams*.

Setting Boundaries

Jenny L. Johnson Ware of Johnson Moore LLC said the Supreme Court did not parse the difference between types of proceedings or between assessment and collection proceedings in *Marinello*. However, a taxpayer that has been subject to a collection action such as a garnishment or filing of a lien notice is not necessarily subject to a proceeding until the debt has been satisfied, she said.

The court in *Adams* considered the question of when the particularized proceeding required by *Marinello* ends, and the taxpayer's [section 7212](#) exposure with it, Johnson Ware said. "It can't be that the IRS takes one step that would constitute a particularized proceeding in that moment but then, for the rest of time, the taxpayer is subject to a prosecution under 7212," she said, adding that there will need to be a definition of the length of pending proceedings as courts,

taxpayers, and the government adapt to *Marinello*.

“I think about it in terms of when is an actual IRS employee assigned to engage in some way with this taxpayer,” Johnson Ware said. Revenue officers would clearly fit that bill, she said. On the other hand, purely computer-generated notices shouldn’t be considered a proceeding, she added.

Josh O. Ungerman of Meadows, Collier, Reed, Cousins, Crouch & Ungerman LLP agreed that the incomplete bankruptcy filing isn’t a good subject for a collection obstruction case. Instead, it would be much easier for the prosecution to establish a nexus between the use of nominee asset holders or filing false collection information documents and IRS collection proceedings, he said.

Kevin F. Sweeney of Chamberlain, Hrdlicka, White, Williams & Aughtry also said that there should be a distinction between automated notices and direct interactions with revenue officers. “Collection is a lot of different things,” he said.

Other Charges

The government may be able to avoid the complexities of when a collection proceeding ends by charging those defendants with evasion of payment under [section 7201](#), according to Sweeney, a former tax prosecutor. “You can make the argument they should have been doing that all along,” he said. Trying to hide assets from collection seems exactly like what Congress meant to include in tax evasion, he said.

While proving a tax due and owing can be a lot of work for the prosecution in an evasion of assessment case, it can be easy in an evasion of payment case, provided that the taxpayer had notice of the debt, Sweeney said.

Ungerman said many of the bad fact patterns that the government has attempted to prosecute under section 7212 should be addressed under different criminal statutes. For example, taxpayers lying during an audit could face perjury charges under 18 U.S.C. section 1001, or the *Adams* bankruptcy form could be charged as a bankruptcy fraud charge, he said.

Raising Nexus

Courts have already begun to split on whether the government must present *Marinello*’s nexus requirement in the indictment. The *Prelogar* court didn’t hold the government to that requirement, but an Alaska district court did in *United States v. Lawson*, [No. 3:16-cr-00121](#) (D. Alaska 2018).

The defendant would always prefer the opportunity to get an indictment dismissed without the risk of going to trial, Johnson Ware said. If forced to face the risks of trial, defendants will also face the usual plea negotiation pressures, she said.

Johnson Ware said she expects to see a wave of new jury instructions for section 7212 in the wake of *Marinello*. She also speculated about the possibility of defendants attempting

interlocutory appeals when courts decline to enforce the nexus requirement on the indictment.

Sweeney said the question for courts is whether *Marinello* created a new nexus element or interpreted existing elements to find the nexus requirement. The Supreme Court was not clear about that, so the lower courts will have to sort it out over the next few years, he said.

Courts could follow *Lawson's* example and look to Sixth Circuit case law, Sweeney said.

The *Marinello* requirement of nexus to a proceeding came from a [line of Sixth Circuit cases](#) starting with *United States v. Kassouf*, [144 F.3d 952](#) (6th Cir. 1998).

Ungerman said *Adams* was a good example of a court forcing the government to meet the new nexus burden. In that case, the judge correctly interpreted *Marinello* as imposing a high hurdle for the government to vault in order to make a tax obstruction case, he said. "Just because the government is not happy with the taxpayer's actions, they are not going to be able to automatically make a 7212 case that is going to result in a conviction," Ungerman said.

Vagueness Challenges

The defense in *Prelogar* also argued that the tax obstruction charge is still too vague, even after *Marinello*, but the court was satisfied with the Supreme Court's new limitations.

Johnson Ware previously asserted that section 7212(a) may still be unconstitutionally vague, but said the further vagueness challenges will be delayed by courts allowing proof of nexus at trial rather than imposing the requirement on the indictment.

"If the courts were requiring it as an element that had to be pled in the indictment, it would be a cleaner legal issue that more defendants would get to raise more quickly," Johnson Ware said. That would get the argument before the circuit courts faster, she added.

Johnson Ware said the question of when a collection case satisfies the *Marinello* proceeding requirement will present a good opportunity to litigate whether section 7212(a) is still too vague.

Ungerman said a strong nexus requirement could allay courts' concerns that section 7212(a) is unconstitutionally vague in application. However, it is critical that taxpayers be on notice regarding when their actions could be obstructive, he said.