news analysis

Overcharging? The Implications of Marinello
by Lee A. Sheppard

Three decades ago — the last time a SAG card holder was president — there were some very ornery tax protesters out west who set up an elaborate barter system. John Grandbouche founded the National Commodity and Barter Association in 1979 to resist the IRS and use gold and silver bullion as currency.

The NCBA ran the National Commodity Exchange, a barter exchange turned bank that held bullion for members but kept no records. The IRS raided the exchange in 1985, shutting it down (National Commodity and Barter Association v. United States, 625 F. Supp. 920 (D. Colo. 1986)). Grandbouche died before he could be prosecuted for aiding and abetting tax evasion. When he died, so did the records — who owned what was in his head — so members struggled to recover their assets. (Prior coverage: Tax Notes, Nov. 29, 1999, p. 1129.)

Members of the group lived to be prosecuted, but it’s difficult for the government to prosecute tax scofflaws who keep no records. Even the crime of evasion requires proof of some tax evaded. So when the defendant intentionally perpetrated acts to frustrate the IRS, but didn’t leave enough of a paper trail to try a more specific charge, the government needs a tool to punish this behavior. The tax obstruction statute serves that purpose (see, e.g., United States v. Marsh, 144 F.3d 1299 (9th Cir. 1998)). But it is broadly worded, so it is controversial.

Our subject is United States v. Marinello, 839 F.3d 209 (2d Cir. 2016), which the Supreme Court will hear. (Prior coverage: Tax Notes, July 3, 2017, p. 40.) Marinello failed to file returns or pay tax for nearly two decades, systematically shredding records along the way. After being convicted of failure to file and obstruction of the IRS, he argued that the obstruction charge required specific knowledge of a pending IRS investigation. (Prior coverage: Tax Notes, Oct. 31, 2016, p. 659.)

The Supreme Court may have accepted Marinello with the intention of reversing it. The Court should affirm the Second Circuit decision. If the tax obstruction statute is overbroad, Congress should rewrite it. Should the Court decide to reinterpret it, one must hope that the justices will not simply choose between briefs. The Court does need to clarify the standard of intent for the statute.

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What the reaction to Marinello boils down to is that practitioners don’t trust the government to continue to exercise restraint in its assertion of tax obstruction charges. Don’t trust the government? Where have we heard that before? Sounds like something college students would put on a T-shirt.

“I don’t trust my government,” said former Justice Department Tax Division prosecutor Jeffrey Neiman of Marcus Neiman & Rashbaum. Marinello confers upon the government “unchecked power to selectively prosecute whatever it deems it wants to prosecute.”

“Unbridled prosecutorial discretion can lead to these absurd results. Even a prosecution that results in acquittal can destroy someone’s life or bankrupt them,” said Diana Erbsen of DLA Piper, former deputy assistant attorney general for appellate and review in the Justice Department Tax Division. But “Marinello anticipates and depends upon appropriate use of prosecutorial discretion.”

Marinello will be discussed at the fifth annual American Bar Association International Tax Enforcement and Controversy Conference on October 27 in Washington. No word on whether there will be T-shirts. Also Kathryn Keneally of Jones Day, former assistant attorney general, Tax Division, and Michael Scarduzio of DLA Piper have an article coming out in The Champion, for
criminal defense lawyers, in October about the tax obstruction statute ("What Does It Mean to Corruptly Endeavor to Impede the IRS: Renewed Government Focus on Section 7212(a)").

The Decision

Marinello is essentially a sentencing case. As we’ve noted before, the U.S. government, having the luxury of the reserve currency, doesn’t crack down on tax cheats like, say, Italy, which doesn’t have its own currency. So very few tax crimes are felonies. Tax fraud, tax evasion, and false returns are felonies (sections 7201, 7206). Most tax crimes are misdemeanors. No tax cheat goes to jail for very long.

Congress has rejected invitations to make failure to file a return a felony. So criminal failure to pay tax, failure to file returns, and failure to keep business records are all misdemeanors that require willfulness (section 7203). Marinello was convicted by a jury of multiple tax misdemeanors for four open years — after having failed to keep records or file returns for nearly two decades. He was also unrepentant. At sentencing, he offered to plead guilty to one count of failure to file.

The prosecution also won a conviction under the tax-specific obstruction of justice statute (section 7212(a)). Under the federal sentencing guidelines, this is treated as an obstruction charge. Marinello got 36 months for obstruction — the maximum provided by the statute — and 12 months for each misdemeanor, with all sentences to be served concurrently. So he would spend only a year in jail if he beat the obstruction charge.

The tax obstruction statute has two clauses — the first specifically referring to intimidation or impeding of officials, and the second “omnibus clause” referring in pertinent part to “in any way corruptly . . . obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title.” The omnibus clause concerns us here.

“This title” refers to title 26, the Internal Revenue Code. In federal parlance, the word “corruptly” means the intent to secure an unlawful advantage or benefit either for oneself or another (United States v. Winchell, 129 F.3d 1093 (10th Cir. 1997); and United States v. Reeves, 752 F.2d 995 (5th Cir.), cert denied, 474 U.S. 834 (1985)). The acts in furtherance of obstruction need not be illegal in themselves (United States v. Bostian, 59 F.3d 474 (4th Cir. 1995); and United States v. Wilson, 118 F.3d 228 (4th Cir. 1997)). The defendant’s actions need not be directed toward IRS personnel (United States v. Mitchell, 985 F.2d 1275 (4th Cir. 1993)).

Marinello operated a Buffalo-based freight business called Express Courier. For nearly two decades, he never filed tax returns, paid his employees in cash, and routinely shredded documents that might prove his income, like bills, receipts, and bank records. He cashed checks written to Express Courier. He used business funds for personal purposes. His modus operandi was revealed to the IRS by an anonymous tip, but five years passed before the IRS developed sufficient interest to pursue him.

An IRS special agent visited Marinello, who acknowledged failure to file but lied about the amount of his business income. After some prodding, he admitted to the agent that his income was high enough for returns to be required, that he used business income for personal expenses, and that he destroyed records. He said that he never got around to filing returns.

Given the federal penchant for overcharging, why wasn’t Marinello charged with tax evasion? Evasion requires proof of material deficiency evaded beyond a reasonable doubt, and the government appears to have struggled to develop numbers. The government estimated that the taxable income at issue was roughly $600,000 over a period of open tax years. The government argued that restitution should be about $350,000, while Marinello contended it should be less than $50,000.

In a sense, Marinello was the paradigm case for an obstruction charge. “It’s a recipe book for tax evasion. If you destroy everything, and you do business all in cash, then the IRS can’t prove evasion,” said Stuart Gibson of Schiff Hardin.

A jury convicted Marinello on all nine counts — eight counts of failure to file tax returns and one count of obstruction under the omnibus clause of section 7212(a). The government offered eight acts of obstruction, including failure to maintain books and records, destroying documents, paying employees in cash, parking assets with his wife, hiding business income in personal bank accounts, and “failing to provide
the defendant’s accountant with complete and accurate information.”

There was some dispute about the accountant’s relationship with the defendant. At the direction of his lawyer, with no knowledge of IRS curiosity, Marinello went to an accountant for assistance with filing back tax returns, but the latter refused to enter a professional contract after concluding that the former was not being fully forthcoming with him. The accountant testified against Marinello at trial.

Marinello admitted to six of the acts of obstruction but argued that he lacked the requisite intent. Over Marinello’s objection, the district court instructed the jury that any one of the eight alleged obstructive acts would be enough to sustain an obstruction charge.

Marinello moved for a new trial, arguing that violation of the omnibus clause required specific knowledge — that is, knowing obstruction of a pending IRS investigation. When that motion was denied, he went to court with the specific knowledge argument. The district court rejected that argument and the Second Circuit affirmed.

The district court held that the words “due administration of this title” do not require knowledge of any pending investigation.

The Appeal

If one were going to petition the nation’s highest court to argue that a statute or an interpretation was overbroad, Marinello’s facts might not be the ideal vehicle. His facts were squarely within the intended use of the statute.

The Supreme Court accepted Marinello to clear up a conflict among the circuits that long predated the Second Circuit decision. The conflict comes down to the First, Second, Ninth, and Tenth disagreeing with a poorly reasoned decision from the Sixth Circuit, United States v. Kassouf, 144 F.3d 952 (6th Cir. 1998). Previously, the Supreme Court rejected certiorari for this issue. (See United States v. Floyd, 740 F.3d 22 (1st Cir.), cert. denied, 135 S.Ct. 124 (2014); United States v. Massey, 419 F.3d 1010 (9th Cir. 2005), cert. denied, 547 U.S. 1132 (2006); and United States v. Sorensen, 801 F.3d 1217 (10th Cir. 2015), cert. denied, 136 S. Ct. 1163 (2016).)

For his specific knowledge argument on appeal, Marinello relied on Kassouf, a case that had similar facts. Kassouf failed to maintain records, used business funds for personal purposes, and filed false returns. He was charged with evasion and false statements, as well as obstruction for failure to maintain records and moving funds between accounts. The Sixth Circuit analogized a similarly worded nontax, federal criminal jury tampering statute to read a knowledge requirement into section 7212(a). It was creative. Of course, there has to be a specific investigation or trial to sustain a charge of jury tampering, for the simple reason that there has to be a jury or grand jury.

The Supreme Court accepted Marinello to clear up a conflict among the circuits that long predated the Second Circuit decision.

The Sixth Circuit held that the words “due administration” require knowledge of an IRS subpoena, audit, or investigation for an obstruction charge to stick. The court worried that otherwise legal conduct — like records destruction — would be unduly and speculatively penalized even if it occurred long before a return was filed. So not merely the existence of an IRS action, but also a defendant’s knowledge of it, should be required to establish the requisite intent.

“Because Title 26 encompasses such routine actions as even the government points out, imposing liability for actions committed before a person knew of an investigation or proceeding, would open them up to a host of potential liability of conduct that is not specifically proscribed,” Circuit Judge Nathaniel R. Jones wrote.

The Kassouf court concluded that the Supreme Court decision on the jury tampering statute required it to limit tax obstruction to knowledge of an IRS action (United States v. Aguilar, 515 U.S. 593 (1995)). That statute’s residual clause hits a defendant who “corruptly . . . endeavors to influence, obstruct or impede the due administration of justice” (18 U.S.C. section 1503). The Court decided that a constitutional interpretation required that the words “due administration of justice” relate to an actual trial or grand jury proceeding. There should be some nexus with a jury, in the Court’s view.

There are two parts to the Kassouf holding. First, there must be a pending IRS action,
investigation, audit, or inquiry. Second, the defendant has to know about it. Marinello merrily wore out shredders with the IRS in the back of his mind, but without specific knowledge that the agency had picked up on him until five years after the informant snitched on him, when he met a special agent.

The Sixth Circuit was the first circuit to address this aspect of the omnibus clause. Shortly afterward, it recognized the error of its ways. One year after deciding *Kassouf*, the court limited that decision “to its precise holding and facts,” sustaining an omnibus clause conviction for filing false forms 1099 and 1096 in the absence of any pending IRS action (*United States v. Bowman*, 173 F.3d 595 (6th Cir. 1999)). The court seemingly reaffirmed *Kassouf* recently, holding that a defendant must be acting in response to some IRS action of which he is aware (*United States v. Miner*, 774 F.3d 336 (6th Cir. 2014).

The Second Circuit sustained Marinello’s conviction on the obstruction charge, rejecting his *Kassouf* argument. Citing *Sorensen*, the court noted that the IRS administers the tax law even in the absence of an investigation or audit by collecting forms and gathering information.

Relying on its previous decision, the *Marinello* court held that the statutory intent requirement sufficiently restricted the reach of the omnibus clause, relying on its prior decision to that effect (*United States v. Kelly*, 147 F.3d 172 (2d Cir. 1998)). In that case, decided the same year as *Kassouf*, the Second Circuit held that the omnibus clause criminalizes “any other” action to obstruct or impede the due administration of the code. The *Kelly* court relied on the “corruptly” intent requirement to prevent any annoyance of an IRS agent from being charged as obstruction.

There is no surprise in this aspect of the Second Circuit decision. Other circuits agreed that the “corruptly” intent requirement — which appears in a few other federal statutes — established a barrier to whimsical, unconstitutional assertion of obstruction charges (*Floyd, Reeves*).

Four other federal circuit courts expressly agreed with the Second Circuit that an IRS action is not required to trigger an obstruction charge under the omnibus clause. “Section 7212(a)’s omnibus clause criminalizes corrupt interference with an official effort to administer the tax code, and not merely a known IRS investigation,” Second Circuit Judge Robert Sack stated. The statute “prohibits any effort to obstruct the administration of the tax code, not merely of investigations and proceedings conducted by the tax authorities.”

The truly original and shocking part of the Second Circuit’s holding was the inclusion of omissions in obstructive acts. Throughout federal statutory law, omissions are punished less severely than actions like lying. Acts and omissions are not regarded as equivalents. That is why failure to file a tax return is punished less severely than filing a false one — even though the filer of a false return has at least alerted the IRS to his existence. In most cases when obstruction is charged, the defendant filed a false return, like *Kassouf* did.

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The Second Circuit held that an omission, as opposed to an affirmative action, could be the basis for an obstruction charge. The statute uses the words “in any way,” which the court held could include omissions. “We do not see how a defendant could escape criminal liability under the omnibus clause for a corrupt omission that is designed to delay the IRS in the administration of its duties merely because the offensive conduct involved an omission,” Sack wrote.

The court sustained the jury instruction that a single instance of obstruction — the government having alleged eight — was sufficient to convict. “There is no requirement under the statute to make certain that, if Marinello was convicted, his conviction was based solely on an affirmative action and not on an omission,” Sack wrote, dealing with Marinello’s demand that the jury unanimously identify an obstructive act on which he was convicted.

In making this demand, Marinello may have been trying to get the jury to convict on an omission, so as to raise the question for appeal. Marinello’s only admitted omission was failure to keep records. But the courts didn’t take the bait. And the Supreme Court did not accept certiorari
on the omission question, and it didn’t have to, because Marinello admitted to enough affirmative acts for a conviction.

When Marinello sought rehearing by the full Second Circuit, it was denied, with two circuit judges dissenting. The Second Circuit dissenters, Jose Cabranes and Dennis Jacobs, disagreed with the majority that the “corruptly” intent requirement would be sufficient to rein in an overzealous prosecutor who might blur the line between aggressive tax avoidance and criminal tax fraud.

Jacobs wrote that the majority’s broader reading of the omnibus clause “cleared a garden path for prosecutorial abuse.” “If this is the law, nobody is safe,” Jacobs warned after listing the obstructive acts of which Marinello was accused.

Like the Kassouf court, Jacobs relied on Aguilar. He also cited the Court’s reading an intent requirement into a federal document destruction statute in an Enron-related case (Arthur Andersen LLP v. United States, 544 U.S. 696 (2005)). The statute in question penalized corruptly persuading someone to destroy documents (18 U.S.C. section 1512). “The panel opinion in Marinello affords the sort of capacious, unbounded, and oppressive opportunity for prosecutorial abuse that the Supreme Court has repeatedly curtailed,” Jacobs wrote.

Jacobs characterized the government’s case against Marinello as the mere failure to keep books and records. But Marinello lied to a special agent, shredded receipts, and used cash to avoid creating trails. Marinello’s tax obligations were pretty straightforward, and his affirmative acts and omissions to avoid them were intentional. But Jacobs argued that no particular IRS agent’s duties were impeded when Marinello quietly shredded receipts.

“The line between aggressive avoidance and ‘corrupt’ obstruction can be difficult to discern, especially when no IRS investigation is active,” Jacobs intoned. But Marinello admitted to those acts and was found to have possessed the corrupt intent to frustrate tax administration that is required by the statute. Jacobs and Cabranes appear to have read the intent requirement out of the statute.

Recognizing that a skilled prosecutor could indict a ham sandwich, Jacobs praised the Sixth Circuit for setting boundaries. He and Cabranes argued that the totality of section 7212(a) presumes the presence of an IRS agent or government employee when it refers to threats and force. So some process involving an individual acting in an official capacity is necessary to trigger any part of the statute, including the omnibus clause.

Otherwise, Jacobs noted, the court should have inquired whether the statute was constitutional. The trouble with the dissenters’ arguments is that the tax obstruction statute has already been adjudged not to be unconstitutionally overbroad in Kelly and five other circuits.

The Petition

Marinello petitioned for certiorari. His argument relied heavily on Kassouf and Jacobs’s dissent. He made a reductio ad absurdum argument about the consequences of accepting the interpretation of the other circuits that have addressed the specific knowledge question. “Under the Second Circuit’s construction, any action that could make the IRS’s ability to assess and collect taxes more difficult — say throwing away an old business receipt or asking for a tip in cash — could be the basis of a felony obstruction charge if alleged by the prosecutor to be ‘corrupt,’” the petition states, arguing that other tax crimes would be swallowed.

Readers, there are intent requirements all over the criminal law, and Anglo-Saxon courts have managed to fairly determine intent since the time of the Magna Carta. Marinello argued that “corruptly” — a standard widely used in federal statutes — is too vague, so that a negligent error could be recast as intentional. Defendants would enter guilty pleas rather than fight at trial. Readers, across the spectrum, the vast majority of criminal cases are resolved by guilty pleas, and it has always been that way.

Moreover, corporate and individual taxpayers would be discouraged from using legitimate but aggressive tax minimization strategies for fear of being dragged up on a felony obstruction charge, Marinello argued. Even if the nation’s white-shoe lawyers were continuously busy devising the worst tax shelters known to man, this activity is not routinely assisted by overheating document shredders.

Relying on Aguilar, Marinello argued that just as the bulk of the jury tampering statute refers to a jury,
the bulk of section 7212(a) refers to threats to IRS officials. So actual enforcement rather than abstraction should be required. The trouble is that other courts have held that specific individual IRS employees are not necessary for an obstruction charge.

In opposing cert, the government argued that nothing in the text of section 7212(a) requires an investigation or audit preceding the defendant’s obstructive acts. As for the Kassouf analogy to the general obstruction statute, the government argued that the Aguilar analysis is not transferable. Section 7212(a) merely refers to “this title” — title 26 — with no reference to a pending IRS action. No predecessor statute or prior judicial construction supports imputation of such a requirement to the statute.

“Furthermore, unlike justice administered in a court proceeding — tax administration is continuous, ubiquitous and universally known to exist,” the government argued. “People are therefore on notice that the IRS is administering the tax code even when they are not aware of a specific, pending proceeding against them.” Not only did Marinello’s acts come squarely within the omnibus clause, but the Kassouf reading would render it superfluous. Hence lower courts recognized that obstruction need not be directed toward a particular IRS agent.

The government argued that the omnibus clause serves an important function in a self-reporting system, which is what the tax system is for closely held business (United States v. Popkin, 943 F.2d 1535 (11th Cir. 1991)). “In a system of taxation such as ours which relies principally upon self-reporting, it is necessary to have in place a comprehensive statute in order to prevent taxpayers and their helpers from gaining unlawful benefits by employing that ‘variety of corrupt methods that is limited only by the imagination of the criminally inclined,’” the Popkin court stated (citations omitted).

Now, it may well be that the Supreme Court likes to narrow these kinds of statutes by finding intent requirements. But it is not clear that the Kassouf formula is the best way to restrict the reach of the omnibus clause. In the tax realm, a requirement that a defendant know he was being investigated would ensure the necessary intent, but would also be a license to go ahead and shred.

Tax compliance is an everyday aspect of business. Readers understand that many white-collar criminal cases feature destruction of evidence. In taxation, unless there is inventory, the evidence tends to consist of piles of paper and bytes on the computer hard drive.

In its amicus brief to the cert petition, the American College of Tax Counsel raised the specter of wrongful prosecution of taxpayers and professionals by a zealous overcharging prosecutor. Calling the Marinello interpretation “an all-purpose tax felony,” the lawyers warned of “a material risk of felony prosecution without fair warning.” They even finished off their brief by suggesting that a small business proprietor would be afraid to open a business outside the Sixth Circuit because the IRS would be so aggressive about recordkeeping.

How’s that again? As Justice Department policy demonstrates, the principal impact of Marinello is on unscrupulous individual preparers and advisers, not small business owners in the Midwest. Just recently a court upheld the conviction of a preparer on an omnibus clause charge (Westbrooks v. United States, No. 16-20409 (5th Cir. June 12, 2017)). Justice has threatened to invoke section 7212(a) against taxpayers who made false statements in streamlined disclosure program filings. (Prior coverage: Tax Notes, Nov. 7, 2016, p. 789.)

Implications

Marinello had a clear-cut, albeit unwritten, document retention policy. He destroyed all documents. Practitioners understandably resist the idea that all of business tax life could be on a permanent litigation hold. But a legitimate document retention policy that is not designed to defeat the IRS should not be the subject of obstruction charges.

“Administration of tax law is happening every year all the time, even if it’s by self-assessment,” said Jay Nanavati of Kostelanetz & Fink, a former Tax Division prosecutor. “It’s not a stretch to say every taxpayer puts themselves under investigation every year. If you purposefully throw sand in the eyes of the IRS, that is a crime.”

At the ABA Section of Taxation Standards of Tax Practice Committee session in Washington in May, Geoffrey Davis of Jenner & Block who
represents Marinello, noted that while tax planners might be tempted to label everything “work product,” that action could be detrimental to the client’s interests. He cautioned that using that label might well trigger a litigation hold in and of itself because the lawyer admitted anticipation of litigation. In turn, that could mean that destruction of documents could be charged as obstruction under the Marinello standard.

For defense counsel, Marinello is a document destruction case. The practical subject of the ABA panel was litigation holds. ABA Civil Discovery Standards require a lawyer to inform the client of its duty to preserve potentially relevant documents in the client’s custody or control and the possible consequences of failing to do so when the lawyer learns that litigation is probable or has been commenced. The panel, hosted by William Farley of Holland & Knight, discussed best practices for litigation holds, preservation of evidence, and document collection.

Davis used Marinello as a way to talk about litigation holds. “It’s at bottom an obstruction case. It deals with the failure to create or keep records,” said Davis. The ABA standards could be read to require taxpayers to hold records from the moment the business was opened. That is, a taxpayer might always be under a hold. A hold is normally triggered when a client reasonably anticipates litigation. An inquiry from the IRS is enough to trigger a litigation hold.

“You'd much rather be defending the merits than fighting over the absence of documents,” said Randy Curato of Attorneys’ Liability Assurance Society Inc. “All of us need a litigation hold sample policy to provide to the client, especially individuals.”

Circular 230 also imposes an obligation to preserve records after a notice or IDR. Clients should preserve a broader range of information than what is in the IDR, and it is in their interest to do so, said Guinevere Moore of Johnson Moore, whose partner drafted the American College of Tax Counsel amicus brief. Clients need to be convinced that preservation of documents would be helpful to them, and to cease their routine document destruction practices, including email deletion. For documents stored electronically, metadata must also be preserved, Davis noted.

“It seems really hard to avoid an obstruction charge at this point, if you destroy any documents,” Davis commented about section 7212(a). Especially in the case of a small business, the willingness of the government to use the omnibus clause to prosecute misdemeanors suggests that establishing a formal document retention program is a good way to avoid a very serious tax charge when the actual tax avoidance is not all that material, he explained, alluding to Marinello. Curato seconded his comments, adding that such a program should be monitored by the lawyer, who could be sued for malpractice.

A day later, at the ABA Tax Section Civil and Criminal Tax Penalties Committee session, David A. Hubbert, acting assistant attorney general, Justice Department Tax Division, mentioned Marinello. He told the assembled practitioners that more obstruction cases are coming, because section 7212(a) is important to self-reporting and voluntary compliance. “There needs to be a way to deal with and punish those who would seek unlawful benefits . . . from obstruction,” he said. A large-scale tax scheme by a promoter can be addressed through the omnibus clause without knowledge of customers’ tax situations on the part of the target, he noted.

Justice will assert the omnibus clause as a supplemental charge to specific crimes when there is additional obstructive conduct that has impeded enforcement.

The omnibus clause will not be used as a substitute for a specific charge, he emphasized. It is a supplemental charge to specific crimes when there is additional obstructive conduct that has impeded enforcement. Hubbert recognized that there are some questions about assertion of this statute, adding that Justice is trying to be transparent. He referred his audience to the Justice Department Criminal Tax Manual for the omnibus clause policies (Chapter 17.03).

A Justice internal directive states that the omnibus clause is generally reserved for conduct occurring after a tax return has been filed, typically conduct designed to impede an audit or investigation, when conspiracy charges are not available (Tax Division Directive No. 77 (1989)). But
Justice believes that the omnibus clause is not limited to conduct occurring after a return was filed. A third party — presumably a preparer or adviser — who continually assists taxpayers in filing false tax returns or other conduct to impede audits is a fit subject for an obstruction charge.

*Popkin* concerned a tax adviser. The Eleventh Circuit sustained an omnibus clause conviction for a lawyer who created a corporation “expressly for the purpose of enabling the defendant to disguise the character of illegally earned income and repatriate it from a foreign bank.” Although it was essentially a drug money laundering case with tax charges, *Popkin* is the kind of case that makes tax professionals nervous.

The omnibus clause was invoked in the EY criminal tax shelter cases. The four defendants were convicted by a jury of acting to prevent the IRS from detecting the fraudulent shelters by creating false documentation and records. The merits of the shelters aside, the main charge was hiding the ball, including destruction of documents. The main event, however, was the *Klein* conspiracy convictions. (Prior coverage: *Tax Notes*, May 11, 2009, p. 685.)

The convictions of two defendants, including an omnibus clause charge, were reversed for insufficient evidence by the Second Circuit. The obstruction charge related to alleged misleading statements made in response to an IDR, so there was no question that an investigation was in process. Cabranes, writing for the majority, held that the alleged misleading statements, which related to aspects of the shelter deals and relied on customer testimony, were not proved beyond a reasonable doubt (*United States v. Coplan*, 703 F.3d 46 (2d Cir. 2012)).

The EY tax shelter cases were clear cases of prosecutorial overreach across the board. As we said at the time about another accounting firm’s shelters, hokey is not criminal. (Prior analysis: *Tax Notes*, July 31, 2006, p. 405.) Hiding the ball can be criminal; a return is an attested document. Lying to investigators can very well be the basis of an obstruction charge. Those acts were alleged in the EY cases, and charged as *Klein* conspiracy and obstruction.

Practitioners suggest that there could be a stand-alone obstruction felony charge in a case that is otherwise not criminal. Has there ever been a stand-alone obstruction charge? Technically, a stand-alone obstruction charge is feasible, but would probably be thrown out. It would be contrary to Justice policy, but practitioners do not trust departmental policy to remain the same forever.

“You’re giving them a powerful new weapon,” said Scott D. Michel of Caplin & Drysdale Chtd. Even though willful obstructive acts like records destruction can be charged as misdemeanors or as part of a *Klein* conspiracy, it is not clear to him that the government would, as a matter of policy, forgo the opportunity to charge a separate felony for that conduct during the planning stage, especially in a circumstance when proving tax evasion or conspiracy might be difficult.

Michel was referring to a common charge made in criminal tax cases (*United States v. Klein*, 247 F.2d 908 (2d Cir. 1957)). *Klein* took the general conspiracy statute and directed it towards tax conspiracies. A *Klein* conspiracy has the following elements: conspiracy to commit another crime; conspirators; a meeting of the minds; overt acts; and an objective to undermine the efforts of the IRS to assess or collect tax (18 U.S.C. section 371). But if tax planning gets in trouble, it will be on the basis of group action and attract a conspiracy charge. Tax planning is not a one-man band.

Nanavati questioned how imputation of a specific knowledge requirement would allay the practitioners’ concern that they might accidentally fall into an obstruction charge for destroying documents in deal planning.

“I don’t see it as posing any risk, let alone a substantial risk, that a stand-alone charge would happen,” said Gibson. “It’s not aimed at dealmakers who accidentally get rid of a document in a deal.”

“The statute’s fine on its face. It does not criminalize accidents,” said Nanavati, who couldn’t see how the ruling that practitioners want would get them where they want to be. “The remedy they’re seeking, a requirement of proof of knowledge of an investigation, doesn’t address their concern. I just don’t know how the requirement of knowledge of the existence of an investigation substantially reduces the risk of criminalizing negligent destruction of records or aggressive tax planning,” he said. “Maybe ‘corruptly’ is not a high enough level of *mens rea*, but I’m comfortable with it.”
A former federal prosecutor argued that the Second Circuit misread its own precedent, stating “Marinello misapplied the Second Circuit law as to the standard of intent.”

“The statute was written to incorporate the concept of intent. Although I share the concerns articulated by the ACTC, I don’t think it criminalizes otherwise non-criminal behavior,” said Erbsen. “It depends on prosecutors to exercise judgment and discretion.” Senior prosecutors and courts must continue to police misuse of prosecutorial discretion and ensure exercise of judgment-based discretion.

“I don’t think section 7212(a) is necessary. The other crimes in IRC and title 18 are sufficient. You don’t need section 7212(a). If you’re going to keep it, the Kassouf standard puts it in line with the other obstruction statutes and reinforces the requisite intent,” said Keneally.

What should disturb practitioners about Marinello is the court’s holding that an omission is sufficient to sustain an oversight charge. Businesses routinely make tax compliance omissions all over the place. “I would be very surprised if a court were to find that a simple omission in and of itself would be sufficient to support this charge,” said a former federal prosecutor.

The Marinello interpretation “criminalizes anything done with the intent to mess with IRS,” said Neiman. “The government shouldn’t have unlimited power to criminalize omissions.” But the Supreme Court did not grant cert on the more interesting omission question.