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Supreme Court Limits Criminal Tax Obstruction Statute

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On March 21, 2018, the Supreme Court sharply curtailed the scope of conduct subject to prosecution under the criminal obstruction provision of the Internal Revenue Code. Specifically, in *Marinello v. United States*, the court held that a defendant must intend to corruptly obstruct a particular tax investigation or audit, either already existing or readily foreseeable, in order to be convicted under the statute.

The so-called Omnibus Clause of 26 U.S.C. § 7212(a) makes it a felony to take any action that "corruptly obstructs or impedes, or endeavors to obstruct or impede, the due administration of the Internal Revenue Code." Circuits had split as to whether any interference with the work of administering the Internal Revenue Code violates the statute, or whether, as with obstruction of justice, only interference with an active federal investigation may be prosecuted.

In a 7–2 decision, the majority held that the statute can only be applied to a defendant who obstructs a tax *proceeding*, such as an investigation or audit. Justice Breyer, writing for the majority, observed that the prohibition is not "a catchall applicable to the entire Code." Rather, in an obstruction case, "the Government must show … a 'nexus' between the defendant's conduct and a particular administrative proceeding, such as an investigation, an audit, or [an]other targeted administrative action." The action must have been pending at the time of the conduct, or else have been "reasonably foreseeable by the defendant." The decision leaves unanswered the question of when a federal tax investigation or audit will be deemed "reasonably foreseeable."

The decision reverses the prior holding of the Second Circuit. The defendant in the underlying case conducted a cash business and maintained no business records, but the government did not prove that he did so to thwart a pending or foreseeable tax investigation. The Second Circuit had affirmed the defendant's conviction, but the Supreme Court remanded the case in light of its decision.

The dissent, authored by Justice Thomas, argued that the plain text of the statute requires that any intentional conduct impeding the administration of federal tax law may be prosecuted criminally.

In recent years, the Department of Justice has taken the position that criminal prosecution may be appropriate for obstructive conduct that takes place "prior to any audit or investigation." Tax Division Directive No. 129. The *Marinello* decision effectively limits this directive, permitting criminal prosecution only where conduct is related to a current, or reasonably foreseeable, administrative action.

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