



by Sandra R. Brown

A TAXING IMPEDIMENT

Although *Marinello v. United States* answered many questions, a wide swathe of uncertainty concerning charges under Section 7212's Omnibus Clause still exists

U. S. SUPREME Court cases that have a profound impact on the entire country and society at large are regularly referred to as landmark decisions. These landmark decisions are so well known that, like our favorite Hollywood stars, we often find ourselves referring to such cases by just one name, e.g., *Miranda*.¹ Arguably, the same can be said when it comes to criminal tax rulings handed down by the Supreme Court. Cases such as *Spies*² and *Cheek*³ come readily to mind. Most recently, the Court has given us *Marinello*.⁴

On March 21, 2018, the Supreme Court, in *Marinello v. United States*, issued its much-debated ruling as to the appropriate reach for alleged criminal tax conduct under the Internal Revenue Code's Omnibus Clause of Section 7212(a), which forbids “corruptly or by force or threats of force...obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, the due administration of [the Internal Revenue

Code].” In a 7-2 majority opinion, authored by Justice Stephen Breyer and joined by Justices John Roberts, Anthony Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor, Elena Kagan and Neil Gorsuch, the Court held that, in order to convict a defendant under the Omnibus Clause, the government must show there was a nexus between defendant's conduct and a particular administrative tax proceeding and also prove that the defendant was aware of the pending tax-related proceeding or could reasonably foresee that such a proceeding would commence.⁵

Resolving a split in the opinions of the circuit courts, the Supreme Court made clear that a broad intent to interfere with, or to impede, the Internal Revenue Service's everyday obligation and ability to collect taxes and administer the tax laws as set forth by Congress in the Internal Revenue Code was not per se sufficient to sustain a conviction under this statutory provision, often referred to as “the tax obstruction

clause.” Rather, the Court read a “proceeding prong” into the text where Congress, in enacting Section 7212(a), simply used the words “due administration of [the Internal Revenue Code].”⁶

Relying in significant part on its prior ruling in *United States v. Aguilar*⁷ when the Court limited the similarly broad statutory language “due administration of justice” in its interpretation of a Title 18 federal obstruction statute⁸ by requiring proof of a nexus between the defendant's obstructive conduct and a particular judicial proceeding, the Court in *Marinello* held the Title 26 federal obstruction statute was limited to proceedings before the IRS. However, in issuing its opinion in *Marin-*

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ello, the Court decidedly left room to question the full extent of those limitations. While the Court signaled to the government, albeit in dicta, a conservative approach to unfettered prosecutorial discretion by its stated unwillingness to leave the interpretation and application of the Omnibus Clause to the sole discretion of the “great power in the hands of the prosecutor,”⁹ the Court nonetheless chose not to eliminate such prosecutorial discretion by making equally clear that it was leaving the door ajar to variant interpretations of this statute by expressing that “we need not here exhaustively itemize the types of administrative conduct that fall within the scope of the statute.”¹⁰ Rather, the Court chose to leave such deciphering by all to an analogy to maritime law, specifically, “the proceeding must at least be in the offing.”¹¹

How did we go from an expansive interpretation, by the government and the majority of the circuit courts, of the Omnibus Clause of Section 7212(a), which admittedly on its face broadly states “or in any other way corruptly...obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title...”¹² to a decision from the Supreme Court that this broad congressional wording is not entitled to such an expansive interpretation.

Congressional Intent

Section 7212(a) of the Internal Revenue Code states:

Whoever...in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than \$5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than \$3,000, or imprisoned not more than 1 year, or both.

The congressional intent in enacting Section 7212(a) was to criminally punish behavior, “where the [IRS] officer is intimidated or injured; that is, where corruptly, by force or threat of force, directly or by communication, an attempt is made to impede the administration of the internal-revenue laws.”¹³ Nonetheless, in the midst of this legislative history, with its focus on conduct directed at an investigating IRS official, Congress in enacting Section 7212(a) chose words that facially discon-

nected the application of the Omnibus Clause to any official IRS proceeding. Instead, Congress chose, in arguably the broadest wording possible, to connect this portion of the criminal tax violation to “the due administration of this title [26 U.S.C.]”¹⁴

Perhaps reflecting even more clearly that Congress intended its selection of words to have real consequences is what Congress did in enacting the penalty provisions of Section 7212(a). Notably, while Congress limited the punishment for acts of threats or force directed at a specific IRS official or a member of his or her family to a misdemeanor, Congress rendered corrupt endeavors to obstruct or impede the due administration of the federal tax laws to be sufficiently harmful to be worthy of punishment as a felony.¹⁵

Prosecutorial Discretion

Faced with this set of mixed signals from Congress, for more than two decades the government did not bring charges for alleged criminal tax conduct under the Omnibus Clause of Section 7212(a). It was in the context of this decades-long void that the Eighth Circuit, in *United States v. Williams*,¹⁶ considered the first appeal of a defendant convicted of violating the Omnibus Clause of Section 7212(a). As stated by the Eighth Circuit in *Williams*:

Our research...has disclosed no case brought by the government under the more general ‘omnibus clause’ of section 7212. We note, therefore, that the proper interpretation of this clause presents us with an issue of first impression, and that we proceed cautiously where for over twenty-five years the Government has feared to tread.¹⁷

Interestingly, the appeal in *Williams* involved a curious set of facts involving not one but three defendants convicted of violating the Omnibus Clause of Section 7212(a). While the conduct of all three defendants stemmed from allegations that they assisted in the preparation and filing of false W-4 forms, two of the three defendants were also charged with, and convicted of violating, Section 7205. The Eighth Circuit, finding that Section 7205, which makes the willful filing of false W-4 forms illegal in its own right, noted that Section 7205’s limiting clause which states that such conviction shall be “in lieu of any other penalty provided by law” could not allow convictions to stand under both Sections 7205 and 7212(a) for acts in connection with the willful filing of false W-4 forms. As such, while affirming the Section 7205 convictions, the Section

7212(a) convictions for these two defendants were reversed.¹⁸ The third defendant was not in the same procedural situation, and thus the court proceeded to consider the meaning of the Omnibus Clause of Section 7212(a). The Eighth Circuit not only looked to the words of Section 7212(a), but also to longstanding Supreme Court criminal tax cases¹⁹ that interpreted various other Title 26 criminal statutes. The Eighth Circuit in upholding the remaining Section 7212(a) conviction held:

[W]e agree with the Government that the broad language of section 7212’s omnibus clause demands a correspondingly broad construction. But section 7212 is only one of several general criminal provisions contained in the Internal Revenue Code. In sum, these provisions establish what the Supreme Court described as a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency.²⁰

Not that many years after the decision in *Williams*, the government issued a policy as to the appropriateness of bringing charges under the Omnibus Clause. The policy, found at U.S. Department Of Justice (DOJ) Tax Division Directive No.77 (1989), while setting forth that the Omnibus Clause typically should be applied to conduct occurring after a tax return has been filed, such that the actions are destined to impede or obstruct an audit or criminal tax investigation, also noted that such charge is not limited to activity after filing tax returns. The policy instead provided prosecutorial discretion—subject to approval by the Tax Division²¹—to consider such charge when, absent sufficient evidence of a conspiracy, a defendant was involved in acts constituting the continual assistance in filing false tax returns, activity designed to obstruct audits, and other “large scale” violations.²²

Almost a decade later, and close to two decades after the Eighth Circuit decision in *Williams*, the Sixth Circuit in *United States v. Kassouf*,²³ having the benefit of the Supreme Court’s decision in *Aguilar*, took a more restrained view of the reach of Section 7212(a)’s Omnibus Clause. The Sixth Circuit in *Kassouf*, relying in large part on the Supreme Court’s decision in *Aguilar* interpreting 18 U.S.C. Section 1503’s “due administration of justice” to require a *nexus* to a judicial or grand jury proceeding, held that a defendant must be aware of an ongoing IRS investigation in

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1. The Omnibus Clause of 26 USC Section 7212(a) prohibits corrupt attempts to impede the due administration of the tax laws.
True.
False.
2. To obtain a conviction for a violation of the Omnibus Clause, the government only has to prove a nexus between a defendant's conduct and a particular administrative tax proceeding.
True.
False.
3. The U.S. Supreme Court in *Marinello v. United States* granted certiorari to resolve a split in the opinions of the circuit courts.
True.
False.
4. Prior to the Supreme Court's decision in *Marinello* only the Sixth Circuit had ruled that the defendant must be aware of an ongoing Internal Revenue Service investigation in order to be convicted of a violation of the Omnibus Clause.
True.
False.
5. Section 7212(a) only provides for a felony criminal tax violation.
True.
False.
6. The legislative history of Section 7212(a) focused on the need to deter threats and intimidation of IRS employees and members of their families.
True.
False.
7. The Supreme Court in *Marinello* eliminated all prosecutorial discretion in deciding what type of conduct can be charged as a violation of the Omnibus Clause.
True.
False.
8. 26 USC Section 7205 makes the willful filing of false W-4 forms illegal.
True.
False.
9. A conviction under Section 7205 does not preclude a conviction under any other statute for acts in connection with the willful filing of false W-4 forms.
True.
False.
10. A defendant who threatens to harm an IRS employee can be charged with a misdemeanor violation under Section 7212(a).
True.
False.
11. The Supreme Court in *Marinello* limited the government's ability to charge a violation of the Omnibus Clause to conduct that involves bodily harm to an IRS employee or his or her family.
True.
False.
12. The Supreme Court's rulings in both *Marinello* and *United States v. Aguilar* placed restraints on the reach of federal criminal obstruction statutes.
True.
False.
13. A conviction for obstructing due administration of justice under 18 USC Section 1503(a) requires proof of a nexus between defendant's conduct and a particular judicial or grand jury proceeding.
True.
False.
14. An intentional failure to timely file a tax return, if required to do so, is not a violation of 26 USC Section 7203.
True.
False.
15. The Omnibus Clause does not include conduct such as routine, day-to-day work carried out in the ordinary course by the IRS, such as the review of tax returns.
True.
False.
16. Knowingly interfering with an ongoing IRS investigation is a violation of the Omnibus Clause.
True.
False.
17. Destroying business records related to an IRS audit, after receiving notice of such audit, is conduct that can be charged under the Omnibus Clause.
True.
False.
18. Knowledge of an ongoing tax proceeding, or at least, the reasonable foreseeability of the commencement of such a proceeding, is a necessary element of a violation of the Omnibus Clause.
True.
False.
19. The Supreme Court in *Marinello* found that Congress did not intend the Omnibus Clause to be a catchall provision that was applicable to the entire Internal Revenue Code.
True.
False.
20. The government may not charge pre-nexus corrupt acts, such as the destruction of books and records, as an affirmative willful attempt in violation of Section 7201.
True.
False.



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order to be charged with having violated the Omnibus Clause of Section 7212(a). As such, the Sixth Circuit upheld the district court's decision to dismiss the charge that the defendant corruptly endeavored to obstruct and impede the due administration of the tax laws in violation of Section 7212(a), which was based on an asserted failure to maintain books and records, thereby making it more difficult to discover and trace defendant's business activities as well as affirmatively misleading the IRS by filing tax returns that failed to disclose financial transactions.²⁴ Following the Sixth Circuit's decision in *Kassouf*, not a single other court of appeals, including the Sixth Circuit itself, in considering the reach of the Omnibus Clause of Section 7212(a), followed *Kassouf*'s narrow application of this statute.²⁵

Marinello's Path to the Supreme Court

Almost 60 years after the enactment of Section 7212(a), Carlo J. Marinello II was charged with a violation of eight misdemeanors in violation of Section 7203 for his alleged willful failure to file various federal tax returns, and one felony in violation of Section 7212(a)'s Omnibus Clause. As summarized in the opinion of the Second Circuit,²⁶ in 1990, Marinello set up, owned, and managed a New York corporation which conducted a freight service business, couriering documents and packages between the United States and Canada. Thereafter, Marinello not only failed to maintain complete documentation of his business's income or expenses, but to the extent records existed, he shredded or discarded most of it. He paid his employees in cash and did not issue to them, or to himself, forms W-2 or 1099. He used the company's funds to pay personal expenses, including mortgage payments on his residence (made indirectly through weekly cash contributions to his wife) and monthly payments to his mother's senior living center.²⁷

In 2004, the IRS received an anonymous letter purporting to outline Marinello's business practices and alleging tax evasion on his part. The IRS began a covert investigation of Marinello's business. While the IRS's records established that Marinello had failed to file individual or corporate income tax returns from as far back as 1992, it was unable to determine a sufficient amount of unreported income to justify continuing the investigation. The investigation was closed with no indication that Marinello was ever made aware of the criminal investigation.²⁸

In 2009, the IRS decided to investigate Marinello again. On June 1, 2009, during

an interview, Marinello told an IRS special agent that he couldn't recall the last time he had filed a return. Initially maintaining that he did not file returns because he did not think they were required for persons who earned less than \$1,000 per year and insisting that his annual earnings had remained below that threshold, Marinello later changed his story and admitted he had earned more than that amount annually, and that he should have paid taxes but "never got around to it." He conceded he used business income to pay for personal expenses by withdrawing from the business bank account and by cashing checks from the company's customers and depositing a portion of them into his personal bank account. He further acknowledged that he shredded bank statements and did not keep track of the company's income or expenses. When asked to explain, he said that is what he had "been doing all along," adding that he "took the easy way out."²⁹ Marinello was charged in a superseding nine-count indictment filed October 16, 2012.

As noted, Marinello was charged with one count in violation of the Omnibus Clause of Section 7212(a)³⁰ and eight counts of violating Section 7203 by willfully failing to file individual and corporate tax returns for each of calendar years 2005 through 2008.³¹ At trial, defense counsel, while conceding Marinello had not filed the returns at issue, argued that Marinello could not be convicted on the Section 7212(a) count because he lacked the requisite criminal intent. Marinello's counsel argued that to corruptly obstruct or impede the administration of the code, a defendant should have undertaken an affirmative act, such as "file a phony return." Marinello, as his counsel argued, had simply failed to act.³² The jury convicted Marinello on all nine counts.

Marinello's post-conviction motion, which relied in part on the Sixth Circuit's decision in *Kassouf*, argued that the phrase "the due administration of this title" of Section 7212(a) refers exclusively to IRS investigations already underway, and thus, a defendant may only be convicted under this statute if he knowingly interferes with an ongoing IRS investigation. The district court denied the motion, concluding that knowledge of a pending IRS investigation "is not an essential element of the crime" and noting that a later panel of the Sixth Circuit had limited *Kassouf* to its facts and that other courts had rejected the *Kassouf* court's reasoning.³³

Marinello appealed to the Second Circuit. While the Second Circuit had not previously issued an opinion as to the appli-

cation of the Omnibus Clause of Section 7212(a), faced with a split amongst the other circuit courts, none of which had decided to follow the Sixth Circuit's decision in *Kassouf*, the Second Circuit ruled with the majority. In aligning itself with the other courts of appeal, the Second Circuit proceeded to differentiate the text of 18 U.S.C. Section 1503 from the text of 26 U.S.C. Section 7212(a), to negate the Sixth Circuit's reliance on the Supreme Court's decision in *Aguilar*. First, the Second Circuit noted the different purposes of the two provisions as reflected in the differences in the wording of Section 1503(a)'s key phrase "the due administration of justice" versus Section 7212(a)'s key phrase "the due administration of this title." Next, the Second Circuit pointed to the legislative history of Section 1503(a), which "makes clear that Congress intended 'the due administration of justice' to refer only to grand jury or judicial proceedings; however, no comparable legislative history points to interpreting 'the due administration of this title' under section 7212(a) in a similar manner." As such, the Second Circuit concluded that the Omnibus Clause of Section 7212(a) criminalized corrupt interference with any official effort to administer the tax code and that it was not limited to a known IRS investigation.³⁴

Marinello's request for rehearing en banc, was denied by the Second Circuit albeit with a strong dissent that relied upon the Supreme Court's decision in *Aguilar*.³⁵

Supreme Court Grants Certiorari

Relying on *Aguilar* and noting two important reasons that *Aguilar* imposed a a nexus requirement in interpreting 18 U.S.C. Section 1503(a) to effectuate the exercise in restraint in assessing the reach of a federal criminal statute: 1) "deference to the prerogatives of Congress" and 2) "concern that a fair warning should be given in language that the common world will understand"—the Supreme Court held such reasons applied equally in interpreting Section 7212(a).³⁶

The Court, viewing a congressional intent to bookend the Omnibus Clause with direct acts against an officer of the IRS by its drafting of the statute to begin with "intimidate or impede any officer or employee of the United States acting in an official capacity" and then later defining intimidate or impede as "threats of bodily harm to the officer or employee of the United States or to a member of his family," construed Section 7212(a) to refer to only "corrupt or forceful actions taken against individual identifiable persons or property." Therefore, the Omnibus Clause could only

relate to obstructive conduct in that more limited context, rather than as a “catchall” for every violation that interferes with the administration of the Internal Revenue Code.³⁷

As noted by the Supreme Court, both the U.S. House and Senate reports accompanying the original enactment of Section 7212(a) in the 1954 code focused on the need to deter threats against and intimidation of IRS agents, other officers or employees of the United States, or members of their families. The Court found that “nothing in the statute’s history suggest[ed] that Congress intended the Omnibus Clause as a catchall applicable to the entire Code including the routine processing of tax returns, receipt of tax payments, and issuance of tax refunds.”³⁸

While holding that the government must now prove a nexus to an audit or criminal investigation and that such “administrative [tax] proceeding” was at least “reasonably foreseeable” to the defendant, the Court saw no need to “exhaustively itemize the types of administrative conduct that fall within the scope of the statute,” merely observing that conduct covered by the omnibus clause “does not include routine, day-to-day work carried out in the ordinary course by the IRS, such as the review of tax returns.”³⁹ The Supreme Court then remanded for a reversal of Marinello’s Section 7212(a) conviction.

Post-Marinello

From a litigation perspective, the courts and the government have already begun, and will undoubtedly continue, to face an array of pending motions within the spectrum of post-indictment stages, from pre-trial to post-conviction, that raise *Marinello* issues. Depending on the stage of the litigation, complex and potential corrective measures may or may not remain available, such as filing superseding indictments, striking alleged acts in counts charging violations of the Omnibus Clause of Section 7212(a) that do not fall within the limits of *Marinello*, corrective jury instructions when trials are already underway, dismissal of charges, reversals, and retrials, or, as in *Marinello*, at a minimum, reversal and resentencing.

From a policy perspective, the Tax Division of the U.S. Justice Department has updated its *Criminal Tax Manual* at Chapter 17.00, titled “26 U.S.C. § 7212(a): ‘OMNIBUS CLAUSE,’” to include a case alert noting that the Supreme Court, by its decision in *Marinello*, had resolved the circuit split concerning the scope of Section 7212(a)’s Omnibus Clause and thereafter setting forth both the specific holding of

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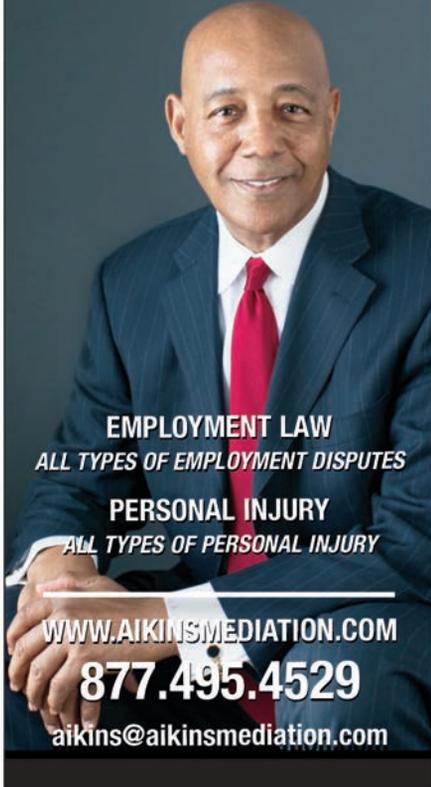
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the Court regarding the need for a nexus between the defendant's conduct and a pending administrative proceeding, or, at least, that such a proceeding be reasonably foreseeable, e.g., "that the proceeding must at least be in the offing."

While the Supreme Court's ruling in *Marinello* has perhaps provided a number of answers in the context of charges under the Omnibus Clause of Section 7212(a), it has also left a number of unanswered questions. When it comes to answering those questions, it may be that what is most important is not how we got here but instead what use will the government and the trial courts have in the future for all of those uncharged but often very colorful and arguably telling, pre-nexus corrupt acts? As history often repeats itself, it may be that the Supreme Court in a decades-old case, known by just one name, has already reasonably forecast the answer to that question, in which case, rather than expecting an abandonment of such corrupt acts, following the very words of the Supreme Court in *Spies*, there will be an uptick in charges brought under Section 7201:

By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be

inferred from conduct such as keeping a double set of books, making false entries of alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.⁴⁰ ■

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).
² *Spies v. United States*, 317 U.S. 492 (1943).
³ *Cheek v. United States*, 498 U.S. 192 (1991).
⁴ *Marinello v. United States*, 584 U.S. ___ (2018).
⁵ *Id.* at *3-11.
⁶ *Id.*
⁷ *United States v. Aguilar*, 515 U.S. 593 (1995).
⁸ 18 U.S.C. § 1503(a).
⁹ *Marinello*, 584 U.S. at *9.
¹⁰ *Id.* at *11.
¹¹ *Id.*
¹² 26 U.S.C. §7212(a).
¹³ H.R. Rep. No. 83-1622, pt. O, at 4781 (1954).
¹⁴ 26 U.S.C. §7212(a).
¹⁵ *Id.*
¹⁶ *United States v. Williams*, 644 F. 2d 696 (8th Cir. 1981).
¹⁷ *Id.* at 699.
¹⁸ *Id.* at 700-701.
¹⁹ E.g., *Spies v. United States*, 317 U.S. 492 (1943); *Sansone v. United*, 380 U.S. 343 (1965).
²⁰ *Williams*, 644 F. 2d at 700 (internal citation and quotation marks omitted).

²¹ *Justice Manual* (formerly *United States Attorneys' Manual*) Title 6: Tax – 6-1.100.
²² DOJ Tax Division Directive #77 (1989), superseded by Directive No. 129 (2004).
²³ *United States v. Kassouf*, 144 F. 3d 952 (6th Cir. 1998).
²⁴ *Id.* at 953.
²⁵ See, e.g., *United States v. Bowman*, 173 F. 3d 595 (6th Cir. 1999); *United States v. Massey*, 419 F. 3d 1008 (9th Cir. 2005); *United States v. Floyd*, 740 F. 3d 22 (1st Cir. 2014); *United States v. Sorensen*, 801 F.3d 1217 (10th Cir. 2015).
²⁶ *United States v. Marinello*, 839 F. 3d 209 (2d Cir. 2016).
²⁷ *Id.* at 211-12.
²⁸ *Id.* at 212.
²⁹ *Id.*
³⁰ It does not appear that the asserted false statements made by *Marinello* to the IRS special agent during the ongoing IRS investigation, noted in the Second Circuit decision, were included as any of the acts alleged in the Section 7212(a) count as charged in the indictment.
³¹ *Marinello*, 839 F. 3d at 212-13.
³² *Id.* at 213-14.
³³ *Id.* at 214.
³⁴ *Id.* at 220-22.
³⁵ Subsequently, the Fifth Circuit in *United States v. Westbrook* (858 F. 3d 317 (5th Cir. 2017)), adopted the same legal position as the Second Circuit as to the breadth of the Omnibus Clause of Section 7212(a).
³⁶ *Marinello v. United States*, 584 U.S. ___, *4 (2018) (internal quotation marks omitted).
³⁷ *Id.* at *5.
³⁸ *Id.* at *6.
³⁹ *Id.* at *11.
⁴⁰ *Spies v. United States*, 317 U.S. 492, 499 (1943).

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