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Could the Feds Make a Felony Case Out of a Lost Lunch Receipt?

“If this is the law, nobody is safe.”

Those are the words of two federal appellate judges. Their concern is that the criminal obstruction statute for tax investigations, 26 U.S.C. § 7212(a), is being interpreted to afford “capacious, unbounded, and oppressive” opportunities for Government abuse. General Counsel should be just as troubled, for these judges see a regime on the horizon where a prosecutor says “show me the man, and I’ll find you the crime.” More likely, the eager prosecutor will say “show me the corporation ...” These two judges are not the only ones on the federal bench who are uneasy; this fall in *United States v. Marinello*, the United States Supreme Court will decide the scope of the statute.

The issue in *Marinello* is whether a defendant who fails to maintain records at a time when the IRS does not have a pending IRS investigation of the individual or corporation may nonetheless be convicted of a felony of obstructing the administration of the tax code.

Under the law of four circuits (First, Second, Ninth, and Tenth) almost any act or omission is a basis for an obstruction charge because there is no mens rea requirement of a pending tax investigation. The action need only be done with intent to obtain an unlawful benefit and that benefit does not need to be a benefit under the tax code. The Sixth Circuit has

split from the other circuits by requiring knowledge of an active IRS investigation. The American College of Tax Counsel and the National Association of Criminal Defense Lawyers filed briefs supporting a certiorari grant and calling for the Supreme Court to narrow the scope of criminal liability.

Concern for General Counsel

The consternation is heightened for corporate counsel advising on legitimate but aggressive tax avoidance strategies. If the strategy turns out to be improper, a lost lunch receipt, incomplete notes from a meeting on accounting methodology or even cash transactions could become fodder for a federal agent or prosecutor looking to criminally indict. General Counsel should monitor *Marinello* as the case works its way through the Supreme Court and seek advice from white collar defense attorneys about accounting practices that are based on aggressive tax minimization.

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