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Tax Litigation Issues

Expert Analysis

Beyond 'Marinello': More Obstacles To Criminal Tax Obstruction Cases

On March 21, the Supreme Court handed down its decision in *Marinello v. United States*, 584 U.S. __ (March 21, 2018), which restricted 26 U.S.C. §7212(a)'s omnibus clause to cases where the government can prove "a 'nexus' between the defendant's conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action." Given that the Department of Justice had long used that provision to prosecute conduct predating audits and investigations, *Marinello* represents a significant limitation on the government's use of the statute. See Jeremy H. Temkin & Miriam Glaser, "Marinello v. United States: *SCOTUS Reins in the Tax Division*," 3 For the Defense 2, 28 (May 2018).

While *Marinello* may rightly be viewed as a bulwark against prosecutorial overreaching in tax cases, a recent decision out of the Southern District of New York raises several other considerations for attorneys with clients facing obstruction charges. In *United States v. Doyle*, 2018 WL 190250 6 (April 19, 2018), Judge Andrew Carter ruled on a series of pretrial motions to exclude evidence that the government planned to offer to prove a §7212(a) charge in light of *Marinello*. The challenged evidence centered on the defendant's invocation of her Fifth Amendment privilege on several tax returns and her efforts to resist responding to grand jury subpoenas, including arguments and statements made by her lawyer. Thus, at the same time that *Marinello* sets out more precisely *what* the government must prove in a tax obstruction case, Judge Carter's decision in *Doyle* limits *how* the government can meet its burden of proof.

By **Jeremy H. Temkin**

'Doyle' Background

Lacy Doyle received a substantial inheritance when her father passed away in 2003. Unfortunately for Doyle, her father left her the money in a Swiss bank account, and in 2006 she moved the money to an account at a second Swiss bank, which was held by a Lichtenstein trust. Like many similarly situated Americans, Doyle neglected to disclose her Swiss bank accounts. In October 2010, she received a grand jury subpoena seeking, among other things, records required to be maintained by persons having foreign financial accounts.

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Over the next seven years, Doyle's efforts to resist the government's subpoenas resulted in a series of decisions by U.S. District Judge William Pauley. First, in February 2013, Pauley applied the Required Records doctrine and rejected Doyle's attempt to invoke her Fifth Amendment privilege to refuse to respond to the first subpoena. See *In re Various Grand Jury Subpoenas*, 924 F. Supp. 2d 549 (S.D.N.Y. 2013). (This column has previously addressed the Required Records exceptions, see Jeremy H. Temkin, "Second Circuit Tackles Required Records Exception," 251 N.Y.L.J. 10 (Jan. 15, 2014); Jeremy H. Temkin, "Fifth Amendment and Government's War on Offshore Accounts," 246 N.Y.L.J. 92 (Nov. 10, 2011).) In April 2013, Judge Pauley held Doyle in contempt for her continuing refusal to comply with the subpoena, but stayed any penalties pending her appeal.

In March 2014, after the U.S. Court of Appeals for the Second Circuit adopted the Required Records exception in *In re Grand Jury Subpoena Dated Feb. 2, 2012*, 741 F.3d 339 (2d Cir. 2013), Doyle withdrew her appeal and produced two emails totaling three pages.

Over a year later, in December 2015, the government received documents from Liechtenstein that tied Doyle to the trust holding Swiss bank accounts. In June 2016, the government issued a new subpoena—requesting essentially the same documents as before, but for later years—and at the same time moved for additional contempt sanctions for Doyle's failure to respond to the initial subpoena. In January 2017, Judge Pauley again held Doyle in civil contempt. See *In re Various Grand Jury Subpoenas*, 235 F. Supp. 3d 472 (S.D.N.Y. 2017).

Doyle made two limited productions of documents obtained from foreign entities in early 2017, and moved to purge the contempt sanctions after each production. Pauley denied both requests and, in an opinion in April 2017, he rejected another attempt by Doyle to invoke the Fifth Amendment. See *In re Various Grand Jury Subpoenas*, 248 F. Supp. 3d 525 (S.D.N.Y. 2017). After yet one more attempt to invoke the Fifth Amendment was denied, Doyle finally complied with the subpoenas.

Meanwhile, in her 2004 through 2009 tax returns, Doyle denied having an interest in or signatory authority over a financial account in a foreign country. Starting after she received the initial subpoena in 2010, however, Doyle responded to the inquiry regarding offshore accounts by referring to and attaching a rider asserting the Fifth Amendment.

In July 2016, in the midst of the subpoena compliance litigation, Doyle was indicted on one count of obstructing and impeding the due administration of the Internal Revenue Code in violation of §7212(a), and one count of filing a false 2009 federal income tax return in violation of 26 U.S.C. §7206(1). In September 2017, after the Supreme Court granted certiorari in *Marinello*, the government superseded the indictment to add a count charging conspiracy to defraud the United States in violation of 18 U.S.C. §371. Additionally, apparently recognizing that the Supreme Court might narrow the scope of the omnibus clause in *Marinello*, the government made clear its intention to offer evidence regarding Doyle's assertion of the Fifth Amendment on her tax returns and her conduct during the extensive subpoena compliance litigation. Doyle moved to preclude this evidence.

Fifth Amendment Assertion

With respect to the government's proposal to offer Doyle's 2010 through 2015 tax returns to show that she never disclosed the account, the government acknowledged that admitting the returns in evidence would invite the jury to draw an adverse inference from Doyle's assertion of the Fifth Amendment, and thus proposed to redact the reference to and exclude the rider. Applying these redactions would have left only a non-response to the question regarding whether Doyle had any foreign accounts. But Judge Carter saw the government's proposed evidence as "the documentary equivalent of defendant's silence" so that "the prosecution would be asking the jury to infer guilt by use of this blank space." Carter further noted that the government's proposal would have presented the jury with an "incomplete and misleading" understanding of what Doyle had put in her returns. Accordingly, he precluded the government from introducing the returns.

Legal Arguments as Evidence

The government also proposed to introduce evidence about the

subpoena litigation starting from the time when Doyle first produced documents as a predicate to an argument that, at a certain point, Doyle's legal arguments were frivolous and made in bad faith and thus that her continued withholding of documents constituted obstruction.

Judge Carter expressed concern that, although the government proposed limiting such evidence to the period after Doyle withdrew her appeal, the evidence would only make sense in light of Doyle's Fifth Amendment assertion. He determined that a finding of bad faith cannot occur "until a judge concludes that it is *perfectly clear*" that the assertion is mistaken—a standard the government could not meet with respect to any of Doyle's legal arguments. In this regard, *Doyle* suggests that, although other considerations may counsel against creative, or thin, assertions of the privilege, concern about their use in an obstruction prosecution probably should not be among them.

Factual Statements by Counsel

Finally, the government wanted to introduce statements Doyle's lawyer made at a November 2016 hearing in front of Judge Pauley. The government alleged that the statements—specifically that the Lichtenstein trust never possessed responsive records and that Doyle could not produce such records—were evidence of obstruction. Here, Judge Carter brushed aside Doyle's concern that the evidence would require her to call her own lawyer to the stand. And he further concluded that the statements were exempt from the hearsay rule because the lawyer was acting as Doyle's agent, even though Doyle was not present when the statements were made.

Nevertheless, after a detailed "sensitive analysis" of considerations under Federal Rules of Evidence 403 and 801(d)(2)(D), Carter excluded the statements. Three factors in particular appeared to sway the court. First, admitting statements by counsel would tend to have a chilling effect on the attorney-client relationship. Second, even if the statements were probative of an obstructive act, they were less so of corrupt intent. Thus, having Doyle's former lawyer testify risked the jury assuming Doyle committed crimes and transferring its views of the lawyer's intent to Doyle. Third, Carter worried about "needlessly consuming time and confusion of the issues" in laying out the necessary context for the jury to understand the lawyer's statements.

Conclusion

Judge Carter's thoughtful decision in *Doyle* not only shines an interesting light on post-*Marinello* litigation under §7212(a), it also presents a cautionary tale to lawyers who make factual representations on behalf of their clients. Indeed, the potential use of a lawyer's statement against a client fighting an obstruction case has unique relevance at this moment. On May 2, 2018, as Special Counsel Robert Mueller considers whether President Donald Trump obstructed justice when he fired FBI Director James Comey, the president's lawyer Rudolph Giuliani publicly claimed that the president had acted because Comey would not publicly clear him with respect to the Russia investigation. Some commentators have seized on this as an admission of corrupt intent.

Whether Giuliani's statement could be admissible under *Doyle* seems to present a close question since it would be evidence of a fact that could show corrupt intent; by contrast, the attorney's statements in *Doyle* were alleged to have been false and potentially obstructive in their own right. Thus, Giuliani's statement would appear to impose less of an intrusion on the attorney-client relationship and less risk of the jury confusing the lawyer's intent for the client's. On the other hand, presenting Giuliani's statement in court would likely lead to exactly the kind of parallel litigation, including an "explication of defense counsel's strategy," that Judge Carter worried about (and perhaps particularly so where several different justifications for the firing have now been proffered).

If nothing else, both cases highlight the potential repercussions that statements a lawyer makes on behalf of a client can have, and the corresponding need for lawyers to exercise care when staking out aggressive factual positions.