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17.00 26 U.S.C. § 7212(a) "OMNIBUS CLAUSE"

17.01 STATUTORY LANGUAGE: 26 U.S.C. § 7212(a)"OMNIBUS CLAUSE"

§7212. *Attempts to interfere with administration of the Internal Revenue Laws.*

(a) Corrupt or forcible interference.

Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threat 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 three years or both.

*As to offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623¹ which increased the maximum permissible fines for both misdemeanors and felonies. For the felony offenses set forth in section 7212, the maximum permissible fine for offenses committed after December 31, 1984, is at least \$250,000 for individuals and \$500,000 for corporations. Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

17.02 GENERALLY

Section 7212(a) of Title 26 contains two clauses. The first clause prohibits threats or forcible endeavors designed to interfere with United States agents acting pursuant to Title 26. *See United States v. Przybyla*, 737 F.2d 828 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985). The second more general clause, known as the omnibus clause, prohibits any act that either corruptly obstructs or impedes, or endeavors to obstruct or impede, the due administration of the Internal Revenue Code. *United States v. Williams*, 644 F.2d 696, 699 (8th Cir.), *cert. denied*, 454 U.S. 841 (1981); *United States v. Popkin*, 943 F.2d 1535, 1539 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1760 (1992).

The Tax Division's policy on the omnibus provision of section 7212(a) is set out in Tax

Division Directive No. 77 (1989). That directive states: In general, the use of the "omnibus" provision of Section 7212(a)

should be reserved for conduct occurring after a tax return has been filed -- typically conduct designed to impede or obstruct an audit or criminal tax investigation, when 18 U.S.C. 371 charges are unavailable due to insufficient evidence of conspiracy. However, this charge might also be appropriate when directed at parties who engage in large-scale obstructive conduct involving actual or potential tax returns of third parties.

(See Section 3.00, *supra*). Use of the omnibus clause is, nevertheless, not limited to conduct occurring after the return has been filed. "Continually assisting taxpayers in the filing of false tax returns or engaging in other conduct designed to make audits difficult; and other numerous large-scale violations of 26 U.S.C. 7206(2) or 18 U.S.C. 287 . . . are examples of situations when Section 7212(a) charges might be appropriate." Directive 77, p.1.

The Eleventh Circuit, in *Popkin*, discussed the value of section 7212(a):

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." *Martin*, 747 F.2d at 1409. We believe that § 7212(a) is such a statute

Popkin, 943 F.2d at 1540.

17.03 *ELEMENTS OF THE OMNIBUS CLAUSE*

To establish a section 7212(a) violation, the government must prove the following three essential elements beyond a reasonable doubt that the defendant: (1) whoever in any way corruptly (2) endeavored (3) to obstruct or impede the due administration of the Internal Revenue Code. *United States v. Williams*, 644 F.2d 696, 699 (8th Cir.), *cert. denied*, 454 U.S. 841 (1981).

17.04 *IN ANY WAY CORRUPTLY*

"Corruptly" in the context of section 7212(a) means to act with the intent to secure an unlawful advantage or benefit either for oneself or another. *United States v. Reeves (Reeves I)*, 752 F.2d 995, 998 (5th Cir.), *cert. denied*, 474 U.S. 834 (1985) (cited with approval in *United States v. Popkin*, 943 F.2d 1535, 1540 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1760 (1992)). The Fifth Circuit in *Reeves I* stated:

It is unlikely that 'corruptly' merely means 'intentionally' or 'with improper motive, or bad or evil purpose.' First, the word 'endeavor' already carries the requirement of intent; one cannot 'endeavor' what one does not 'intend.' Similarly, the mere purpose of obstructing the tax laws is 'improper' and 'bad'; therefore, to interpret 'corruptly' to mean either 'intentionally' or 'with an improper motive or bad or evil purpose' is to render 'corruptly' redundant.

Reeves I, 752 F.2d at 998. See also *United States v. Dykstra*, 991 F.2d 450, 453 (8th Cir.), *cert. denied*, 114 S. Ct. 222 (1993); *United States v. Yagow*, 953 F.2d 423, 427 (8th Cir. 1992); *United States v. Hanson*, 2 F.3d 942 (9th Cir. 1993).

A broad reading of the term "corruptly" is further dictated by its modifying phrase "in any other way". See *United States v. Mitchell*, 985 F.2d 1275, 1279 (4th Cir. 1993) (the language of the clause encourages a broad construction and should be read to include the full scope of conduct that such a construction commands). "Section 7212(a) is directed at efforts to bring about a particular advantage such as impeding collection of one's taxes, taxes of another, or the auditing of one's or another's tax records," *Reeves I*, 752 F.2d at 998, or financial gain, *Dykstra*, 991 F.2d at 453. Use of the word "corruptly" does not limit the reach of the statute to some action taken against another person as the object of the action. *Mitchell*, 985 F.2d at 1277-78.

In *Dykstra*, the defendant retaliated against federal officials involved in an IRS collection action by sending the officials IRS Forms 1099 indicating that the defendant had paid the officials nonemployee compensation. The defendant then notified the IRS that the officials failed to pay

taxes on the nonemployee compensation and requested a reward from the IRS for supplying the information. The court held that the defendant acted corruptly because he attempted to secure an "unwarranted financial gain for himself," namely to prevent his home from being seized by the IRS to satisfy his tax liability and to obtain rewards for reporting alleged tax violations. *Dykstra*, 991 F.2d at 453. See also *United States v. Kuball*, 976 F.2d 529 (9th Cir. 1992) (defendant acted corruptly where, in order to obtain a substantial tax refund, he sent false Forms 1099 and threatening letters to IRS employees).

The benefit sought by the defendant need not be financial for the "corruptly" element to be satisfied. In *United States v. Yagow*, 953 F.2d 423, 427 (8th Cir. 1992), the defendant engaged in a Form 1099 scheme directed at over 100 individuals involved in the liquidation of his farm and his son's prosecution on state alcohol possession charges. Relying on *Reeves I*, 752 F.2d 995, Yagow argued that the prosecution had failed to prove that he acted "corruptly," because there was no evidence that he had sought financial advantage from his Form 1099 scheme. The Eighth Circuit held that proof that Yagow acted to get his property back or receive money he claimed was owed to him was sufficient to prove he acted "corruptly," and stated:

While we are inclined after examining *Reeves* to reject Yagow's assertion that the term corruptly is limited to situations in which the defendant wrongfully sought or gained a financial advantage, we need not decide this issue, as ample evidence was presented to show that Yagow acted with the motive of securing financial gain.

Yagow, 953 F.2d at 427. The *Yagow* court relied on the Fifth Circuit's opinions in *Reeves I* and *United States v. Reeves (Reeves II)*, 782 F.2d 1323, 1325-26 (5th Cir.), cert. denied, 479 U.S. 837 (1986), which implies that a financial motive is not the only benefit which satisfies the "corruptly" element of section 7212(a). The court in *Reeves II* noted:

[o]n remand, the court found that Reeves had acted with the intention of securing benefits to himself insofar as the filing of the lien on . . . [an IRS agent's] property would divert his time and attention from pursuing tax investigations against Reeves and others. The district court concluded as a matter of law that Reeves had violated § 7212(a).

Reeves II, 782 F.2d at 1326. The Fifth Circuit held that the inference that the defendant acted with the intent of diverting the agent's energies from the investigation was reasonable and affirmed Reeves' conviction. **Reeves II**, 782 F.2d at 1326.

Mere "harassment" of an agent, if it is not done to obtain an undue advantage, may not rise to the level of a section 7212(a) violation. The court in **Reeves I** stated:

[T]here is no reason to presume that *every* annoyance or impeding of an IRS agent is done *per se* "corruptly." A disgruntled taxpayer may annoy a revenue agent with no intent to gain any advantage or benefit other than the satisfaction of annoying the agent. Such actions by taxpayers are not to be condoned, but neither are they "corrupt" under Section 7212(a).

Reeves I, 752 F.2d at 999 (emphasis in original).

Conduct can be corrupt under the provisions of the omnibus clause even if it is not directed at individual officers or employees of the Internal Revenue Service. The omnibus clause of § 7212(a) "conspicuously omits the requirement that conduct be directed at 'an officer or employee of the United States Government.'" **Dykstra**, 991 F.2d at 452 (quoting **Popkin**, 943 F.2d at 1539). Two of the many victims of the Form 1099 scheme in **Dykstra** were not government agents. One was the former employer of Dykstra's wife and the other was a bank employee who released Dykstra's wife's bank funds to the IRS. **Dykstra**, 991 F.2d at 451-52. The Eighth Circuit held that the section 7212(a) charge properly included the defendant's actions against the nongovernment victims. **Dykstra**, 991 F.2d at 452.

"Misrepresentation and fraud . . . are paradigm examples of activities done with an intent to gain an improper benefit or advantage." **United States v. Mitchell**, 985 F.2d 1275, 1278 (4th Cir.

1993). In *Mitchell*, the District Court had dismissed a section 7212(a) charge where the defendant, a U.S. Fish and Wildlife Service employee, applied for tax exempt status for his consulting business, American Ecological Union (AEU). *Mitchell*, 985 F.2d at 1276. The government alleged the application falsely stated that AEU's purpose was to promote ecological research, and that AEU actually arranged big-game hunting trips in Pakistan and China, for which AEU was paid tax deductible "contributions." *Mitchell*, 985 F.2d at 1277. In reversing the dismissal, the Fourth Circuit concluded that "fraudulently representing to the IRS that his organization was involved in tax exempt activities, using his tax exempt status to solicit contributions that were not used for tax exempt purposes, and inducing hunters to file false returns" fit "neatly" within the *Reeves I* definition of "corruptly." *Mitchell*, 985 F.2d at 1278.

An endeavor may be corrupt even when it involves means that are not illegal in themselves. *Mitchell*, 985 F.2d at 1279 (and cases cited); *Popkin*, 943 F.2d at 1537 (attorney acted corruptly where he 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").

17.05 ENDEAVORING

The second element of the omnibus clause of section 7212(a) is "endeavoring." The courts have looked to case law interpreting similar language in the obstruction of justice statutes, 18 U.S.C. §§ 1503 and 1505, to aid in defining the term for purposes of section 7212(a). *United States v. Williams*, 644 F.2d 696, 700-01 & n. 11 (8th Cir.), *cert. denied*, 454 U.S. 841 (1981); *United States v. Martin*, 747 F.2d 1404, 1409 (11th Cir. 1984).

Relying on the Supreme Court's definition of "endeavor" in *Osborn v. United States*, 385 U.S. 323, 333 (1966), the Eleventh Circuit in *Martin* defined "endeavor" as "any effort . . . to do or accomplish the evil purpose that section was intended to prevent." *Martin*, 747 F.2d at 1409. The court in *United States v. Dykstra*, 991 F.2d 450 (8th Cir.), *cert. denied*, 114 S. Ct. 222 (1993),

relying on another obstruction case, *United States v. Silverman*, 745 F.2d 1386, 1393, 1396 n. 12 (11th Cir. 1984), defined "endeavor" as follows:

[T]o effectuate an arrangement or to try to do something, the natural and probable consequences of which is to obstruct or impede the due administration of the Internal Revenue Laws.

The manner by which a defendant can "endeavor" to impede the due administration of the internal revenue laws is unlimited. As noted above, the omnibus clause contains broad language that prohibits conduct that impedes the due administration of the internal revenue laws "in any way."

The most common way to endeavor to impede or obstruct the due administration of the tax code is to take direct action against officials involved in investigating or prosecuting tax charges. In *United States v. Martin*, 747 F.2d 1404 (11th Cir. 1984), a taxpayer knowingly filed a false complaint with the IRS alleging agent misconduct during an audit. *Martin*, 747 F.2d at 1408, 1410. The Eleventh Circuit affirmed the defendant's section 7212(a) conviction, holding that the filing of a false complaint against an IRS agent was an endeavor to impede the due administration of the internal revenue laws. *Martin*, 747 F.2d at 1409-10. *But see United States v. Hylton*, 710 F.2d 1106 (5th Cir. 1983), *aff'g*, 558 F. Supp. 872 (S.D. Tex. 1982) (section 7212(a) conviction can not be based on nonfraudulent complaint against IRS agents).

In *Williams*, 644 F.2d at 700-01 & n. 11, the Eighth Circuit affirmed the conviction of defendant Terrell, holding that "conduct assisting the preparation and filing of false W-4 forms constitutes an endeavor to impede or obstruct the due administration of the Internal Revenue Code. We conclude that section 7212's omnibus clause plainly comprehends this conduct." *Williams*, 644 F.2d at 701.

The Form 1099 scheme previously described in Section 17.04, *supra*, is a method frequently used to impede the administration of the internal revenue laws. In *United States v. Yagow*, 953 F.2d 427 (8th Cir. 1992), a typical Form 1099 scheme case, the defendant sent bills and

Forms 1099-MISC to several officials involved in the liquidation of his farm which falsely claimed that he had paid the officials nonemployee compensation. The defendant also filed the Forms 1099 with the IRS. The court found that the Form 1099 scheme was an attempt to impede the administration of the tax laws. *Yagow*, 953 F.2d at 427. See also *Dykstra*, 991 F.2d at 453; *United States v. Rosnow*, 977 F.2d 399, 410-11 (8th Cir. 1992), cert. denied sub nom. *Dewey v. United States*, 113 S. Ct. 1596 (1993); *United States v. Kuball*, 976 F.2d 529, 532 (9th Cir. 1992).

A number of other activities also have been found to violate the omnibus clause. *United States v. I.H. Hammerman*, 528 F.2d 326, 328 (4th Cir. 1975) (defendant pled guilty to section 7212(a) charge based on his acting as "bagman" for Vice President Spiro Agnew in tax evasion scheme); *United States v. Higgins*, 987 F.2d 543, 544 (8th Cir. 1993) (sending false bills to numerous individuals, claiming the billed amount as forgiven debt on IRS forms and requesting rewards for reporting the debtors to the Internal Revenue Service); *United States v. Shriver*, 967 F.2d 572, 573-74 (11th Cir. 1992) (transfer of real estate into spouse's name and filing of an altered Lien Notice in attempt to release IRS lien).

17.06 ***TO OBSTRUCT OR IMPEDE THE DUE ADMINISTRATION OF THE INTERNAL REVENUE LAWS***

The omnibus clause is aimed at prohibiting efforts to impede the collection of one's taxes, the taxes of another, or the auditing of one's or another's tax record. *United States v. Kuball*, 976 F.2d 528, 531 (9th Cir. 1992).

Although it is necessary in omnibus cases to prove that a defendant attempted to impede or obstruct the administration of the internal revenue laws, there is no requirement that a defendant's actions have an adverse affect on the government's investigation. *United States v. Rosnow*, 977 F.2d 399 (8th Cir. 1992), cert. denied sub nom. *Dewey v. United States*, 113 S. Ct. 1596 (1993). In *Rosnow*, the defendants, who were being investigated for various internal revenue violations, filed false Forms 1099 against IRS agents and other law enforcement officials in an

attempt to impede the investigations. *Rosnow*, 977 F.2d at 403. The defendants claimed that they could not be convicted under the omnibus clause because they did not successfully impede the IRS investigation. The Eighth Circuit found that filing false Forms 1099 was an attempt to impede the investigation which was punishable under the omnibus clause even though the attempt was unsuccessful. *Rosnow*, 977 F.2d at 410.

There is also no requirement that a defendant attempt to impede the IRS on his own behalf; impeding the IRS on another's behalf violates the omnibus clause. See *United States v. Popkin*, 943 F.2d 1535, 1541 (11th Cir 1991), *cert. denied*, 112 S. Ct. 1760 (1992) (an attorney can be prosecuted under the omnibus clause where he creates a corporation intended to assist a client to avoid reporting taxable income from drug transactions).

Action need not be taken against a government agent to constitute a violation of the omnibus clause. A violation occurs whenever a defendant intends to impede the administration of the tax laws. *United States v. Mitchell*, 985 F.2d 1275, 1277 (4th Cir. 1993). In *Mitchell*, the court held that the omnibus clause prohibits attempts to violate the due administration of the internal revenue laws and should be read broadly to include behavior like the defendant's that was not directed at IRS officials.

17.07 *VENUE*

Venue for a section 7212 prosecution lies in the district where the defendant committed the corrupt act(s) constituting an endeavor to impede the administration of the Internal Revenue Code. See 18 U.S.C. § 3237. See Section 6.00, *supra*.

17.08 *STATUTE OF LIMITATIONS*

Section 6531 of the Internal Revenue Code contains the statute of limitations provisions for violations of section 7212(a). Section 6531(6) provides a six-year statute of limitations for offenses described in section 7212(a) "relating to intimidation of officers of the United States." It is the

position of the Internal Revenue Service and the Tax Division that this provision encompasses only the first or more specific clause of section 7212(a) and not the omnibus clause. Section 6531(1) contains broad language similar to that which appears in the omnibus clause and is not, as section 6531(6) appears to be, limited to intimidation of officers of the United States. Section 6531(1) provides a six-year statute of limitations for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner. 26 U.S.C. § 6531(1). Therefore, section 6531(1) should be used for omnibus clause offenses.

Accordingly, the statute of limitations for an omnibus clause offense will run six years from the last act which constitutes a corrupt endeavor to impede and impair the due administration of the tax code. 26 U.S.C. § 6531(1). *See* Section 7.00, *supra*.

17.09 SENTENCING GUIDELINES

The most appropriate sentencing guideline to be applied to section 7212(a) violations is the general obstruction of justice guideline, USSG §2J1.2. *United States v. Dykstra*, 991 F.2d 450, 454 (8th Cir.), *cert. denied*, 114 S. Ct. 222 (1993). Noting that "the language and structure of § 7212 track part of certain federal obstruction of justice statutes" and that the courts have used those statutes to interpret section 7212(a), the Eighth Circuit in *Dykstra* approved the application of the general obstruction of justice guideline, USSG §2J1.2, in sentencing section 7212(a) violations. *Dykstra*, 991 F.2d at 454 (quoting *United States v. Williams*, 644 F.2d 696, 699 n.11 (8th Cir.), *cert. denied*, 454 U.S. 841 (1981)).

Courts have also sentenced section 7212(a) violations under Part 2T, Offenses Involving Taxation, of the sentencing guidelines. In *United States v. Hanson*, 2 F.3d 942 (9th Cir. 1993), the Ninth Circuit held that the district court's application of § 2T1.9, Conspiracy to Impair, Impede, or Defeat Tax, was improper because the evidence indicated that Hanson acted alone in his Form 1099 scheme. The Ninth Circuit "conclude[d] that § 2T1.5, Fraudulent Return, Statements, or Other

Documents, more closely fits Hanson's conduct." *Hanson*, 2 F.3d at 947. In a factually similar case, *United States v. Krause*, 786 F. Supp. 1151 (E.D.N.Y.), *aff'd*, 978 F.2d 906 (2d Cir. 1992), the court considered which subsection of section 2T1.3(a), Fraud and False Statements Under Penalty of Perjury, should be applied in sentencing the defendant's section 7212(a) conviction. Section 2T1.3(a) provides:

- (a) Base Offense Level:
 - (1) Level from §2T4.1 (Tax Table) corresponding to the tax loss; if the offense was committed in order to facilitate evasion of a tax, or
 - (2) 6, otherwise.

USSG §2T1.3(a). The court held that section 2T1.3(a)(2) should be applied to the defendant's Form 1099 scheme because "the government suffered no actual tax loss through Krause's tax protest activities. In addition, Krause was not charged or convicted with tax loss or tax evasion or false tax credit." *Krause*, 786 F. Supp. at 1158.

However, the Eleventh Circuit, in *United States v. Shriver*, 967 F.2d 572 (11th Cir. 1992), upheld the trial court's application of sentencing guideline § 2F1.1 Fraud and Deceit, to the defendant's section 7212(a) violation, reasoning that the Fraud and Deceit guideline most closely tracked Shriver's actions attempting to defeat an IRS lien.

The November 1993 changes to the Sentencing Guidelines direct a court to apply either the Obstruction of Justice guideline (§2J1.2) or the Tax Evasion guideline (§2T1.1). USSG App. A.

1. Changed to 18 U.S.C. §3571, commencing Nov. 1, 1986.