

**American Bar Association Taxation Section
Criminal and Civil Tax Penalties Committee
May Meeting 2019**

Important Developments: Criminal

Sara Neill¹ & Evan Davis²

1. The IRS remains serious about criminal employment tax cases.

Four days before filing season ended, the IRS issued a press release highlighting that employers cheat on employment taxes at their peril.

After laying out why the IRS cares – 72% of revenue collected by the IRS comes via employment taxes – Commissioner Chuck Rettig and others touted 50 law enforcement actions related to employment tax crimes. In what prosecutors and agents call a “sweep,” in the preceding two weeks AUSAs and DOJ Tax Division prosecutors indicted 12 individuals, executed four search warrants, and saw six defendants sentenced for employment tax crimes. Given how few tax prosecutions are occurring (see below), this emphasis demonstrates that Commissioner Rettig is continuing his predecessor’s emphasis on employment tax crimes to increase the compliance rate.

DOJ Tax Division press releases in recent months confirm the joint emphasis on employment tax prosecutions, at least in the South. On March 22, 2019, a North Carolina health executive was sentenced to 30 months’ imprisonment for failing to report and pay over employment taxes from 2010 to 2013. A week later, two Louisiana residents were charged with a typical pair of crimes: harboring undocumented alien workers by paying them cash wages under the table, and employment tax crimes for failing to report the under-the-table wages. On the same day, a husband-wife pair were indicted for payroll tax fraud in Alabama for allegedly having paid vacation home and other personal expenses instead of remitting the withheld amounts. Finally, on March 7, 2019, a Florida CPA was sentenced to 39 months’ incarceration for failing to pay employment taxes along with other tax crimes involved with his personal tax returns and assessments.

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2. District court says *Marinello* inapplicable to 18 U.S.C. Sec. 371 conspiracies.

We noted in an earlier CCTP presentation that a defendant was arguing that *Marinello* applied equally to the general conspiracy statute, 18 U.S.C. Sec. 371, because both statutes include a similar element: “to obstruct the lawful function of the government” for §ec. 371, versus “obstructs or impedes, or endeavors to obstruct or impede, the due administration of the” IRC. *United States v. Parlato*, W.D.N.Y. Case No. 1:15-cr-149, decided 03/01/2019.

In the March 1 order, the district court upheld the magistrate judge’s R&R that distinguished Section 371 from Section 7212 by noting that Section 371 prohibits obstructing the lawful function of the government, whereas Section 7212 is focused on obstructing the due administration of the Tax Code. To many, this would seem to be a distinction without a difference, but the R&R that the district court adopted also noted that Section 371 was not as broad as Section 7212 and, therefore, did not raise the same overbreadth concerns that drove the Supreme Court to impose a nexus requirement in *Marinello*.

The district court and magistrate court decisions are somewhat perfunctory. It would seem to be worth a defendant raising this issue again in the right situation, such as where a Section 371 charge apparently was brought in lieu of a Section 7212 charge because the government could not satisfy the nexus requirement.

3. Eighth Circuit says *Marinello* added two elements to Section 7212(a)’s omnibus clause.

In 2009 and 2010, Beckham allegedly prepared and filed tax returns for the owner of a financial advisory firm, JM Horseman group. Beckham allegedly induced the owner, Horseman, to participate in a tax-loss scheme designed to offset Horseman’s taxes. Horseman was audited and Beckham represented him as the power of attorney. During the audit, the IRS Revenue Agent asked for certain information from Horseman including his day planner which was allegedly falsified. The Revenue Agent determined there to be firm indications of fraud and referred Horseman to criminal investigation. At some point, IRS-CI shifted the focus of its investigation to Beckham.

Beckham was indicted for three counts of section 7206(2) and one count of section 7212(a). The section 7212(a) charge included approximately 12 alleged corrupt acts, some of which, if true, would have occurred prior to the IRS audit and some would have occurred during the IRS audit. Beckham pled not guilty and proceeded to trial.

Sometime after Beckham was indicted, but before the case was tried, the Supreme Court granted certiorari in *U.S. v. Marinello*, 839 F.3d 209 (2d Cir. 2016) cert. granted---U.S.---, 137 S.Ct. 2327, 198 L.Ed.2d 755 (2017), to resolve a circuit split over whether Section 7212(a) requires a defendant to know about a pending IRS proceeding when he engages in purportedly obstructive

conduct. Beckham filed a motion to stay trial while *Marinello* was pending. The Government objected and the district court, agreeing with the Government, decided that the issue could be handled through the use of a special verdict form whereby the jury would be asked to specifically find which of the alleged corrupt acts occurred to convict Beckham of section 7212(a).

Beckham objected to the section 7212(a) instruction proposed by the Government because it did not require the jury to find that Beckham knew about the IRS audit at the time of the alleged corrupt acts. According to the opinion, Beckham did not specifically object to the language of the special verdict form. The district court overruled Beckham's objection.

The jury acquitted Beckham of the three section 7206(2) charges, but found him guilty of violating section 7212(a). On the special verdict form, of the approximately 12 alleged corrupt acts charged, the jury marked only one box finding that Beckham had submitted Horseman's day planner to the IRS.

After being sentenced, Beckham appealed. He argued, among other things, that the district court failed to properly instruct the jury as to the *Marinello* elements and the special verdict form did not cure the error. The government conceded that the jury instruction was erroneous, but argued that the special verdict form did cure the error and even if it did not, the error was harmless.

The Eighth Circuit held: "Marinello thus added two elements—a nexus and knowledge of a currently-pending or reasonably-foreseeable proceeding—that this Court did not previously require." *Beckham*, No. 18-1406, slip op. at 6 (8th Cir. Mar. 8, 2019) (published but not yet reported).

The court explained that whether the instructional error was harmless depends on whether overwhelming evidence supports finding (1) that there was a nexus between Beckham's actions during the IRS audit; and (2) that Beckham knew or should have known about the audit when he committed some corrupt act.

The court said the evidence was undisputed that the day planner was given to the IRS by Beckham. Thus, the court found that no rational juror could find that Beckham did not give the day planner to the IRS and therefore, the instruction error was harmless as to the nexus requirement.

Likewise, the Court found the evidence to overwhelmingly show that Beckham knew of a currently-pending IRS audit at the time he gave the day planner to the Revenue Agent. Thus, because no rational juror could find that Beckham was unaware of the pending audit at the time the IRS received the day planner, the instruction error was harmless.

The conviction was affirmed.

4. Monthly Tax Prosecution Numbers Rebounding?

Not surprisingly, each year tax prosecutions spike in March and April, both because statutes often expire in April and because the IRS and Department of Justice Tax Division like to remind taxpayers about the consequences of cheating while the same taxpayers are preparing their returns.

Syracuse University tracks monthly tax prosecution numbers and has data going back 15 years. <https://trac.syr.edu/tracreports/bulletins/tirs/monthlyfeb19/fil/> The data show the aforementioned spike every year along with a year-over-year spike in 2013, which represents the high-water mark in tax prosecution during the 15-year period.

Since 2015, the trend has been sharply downward, with prosecutions dropping by 50% between 2015 and 2019. However, in comparison to 2007-2009, the decline is not as sharp. The data do not identify the type of tax case being brought, but the 2013-2015 high-water mark is due in large part to the high-volume, relatively low-effort identify theft cases that were prevalent during that period. As noted in the January update, the IRS has shifted away from these cases and back to core tax investigations, so we should expect numbers to decline because of this shift.

With all this in mind, it appears the number of tax prosecutions is finally beginning to rebound from the 15-year lows set in 2018, with the past two months showing strong increases from the same months in 2018. The March and April numbers will show whether the recent months are anomalous, or whether the agency has turned a corner.

5. In March 2019, the IRS released the revised Form 14457 for use when requesting preclearance and participating in voluntary disclosure program.

As everyone is undoubtedly aware at this point, back in November 2018, the IRS issued a memorandum outlining its updated voluntary disclosure practices in domestic and offshore matters. The IRS promised, at that time, to release a revised Form 14457 for use when requesting pre-clearance into the voluntary disclosure program, as well as for use when the voluntary disclosure is submitted. The Form was released in March 2019 and a copy is attached to these materials.

6. Tax return preparer's appeal to the Eleventh Circuit unsuccessful despite her argument there was no evidence that she actually prepared tax returns.

Though not a particularly significant decision from a legal standpoint, the *McConico* opinion contains facts that we found interesting. *U.S. v. McConico*, No. 18-11189, 123 AFTR 2d 2019-XXXX (11th Cir. Apr. 9, 2019).

A federal jury convicted McConico of 17 counts of assisting in the preparation of false tax documents. On appeal to the Eleventh Circuit, McConico argued the evidence was insufficient to support her convictions.

According to the opinion, the IRS began investigating McConico after finding some “oddities” during an audit of a married couple, the Woffords. The Woffords identified McConico as their tax preparer.

The IRS’s investigation uncovered several red flags including: all of the returns filed from McConico’s IP address claimed refunds; about 90% claimed education credits; and over 90% had businesses associated with them.

An undercover agent contacted McConico and McConico told the agent he would need a “trusted referral to get in”, stated that she was “not looking for any wolves in sheep’s clothing”, and assured the agent she knew what she was talking about, having previously worked for H&R Block, Jackson Hewitt, Liberty Tax, and even the IRS. Several taxpayers identified McConico as being their preparer.

Later, when an IRS agent went to visit McConico, not undercover, McConico told the agent she had no tax training besides a single class in the 1990s, that she had never worked for another tax preparation business or the IRS, and stated that she did not prepare returns. She denied preparing the Woffords’ taxes. McConico claimed her office taught people how to set up businesses and people could come to her business to do their taxes themselves.

Subsequently, the IRS executed a search warrant at McConico’s home and located W-2s, driver’s licenses, and social security information. A laptop containing thousands of tax returns was seized from the top of McConico’s bed.

McConico was indicted on seventeen counts of assisting in the preparation of fraudulent tax returns. She pleaded not guilty and proceeded to trial. Her first trial ended in a mistrial. After the second, McConico was convicted of all seventeen counts.

On appeal, McConico argued that there had been no evidence that she filled out or sent in a single tax return and someone else could have submitted the returns. She also argued her lies about her tax expertise were merely boasting, that the documents in her home belonged to someone else, that other people had access to the bank accounts where the taxpayer refunds went, and that the computer on her bed was not hers.

The Eleventh Circuit found that a reasonable juror could have relied on the evidence against McConico to find her guilty. And that the jury quite reasonably could have inferred a simpler explanation—that all of the evidence pointed to McConico because she was actually guilty. The court, unsurprisingly, affirmed McConico’s conviction.

Note: Use Part I of this form to make a preclearance request to determine whether you are eligible to use the voluntary disclosure practice. Only submit Part 1 of this form for preclearance. If you receive preclearance, proceed with submitting Part II to request preliminary acceptance. Submitting the information requested in Part I of this form does not guarantee acceptance. **All answers and attachments must be in English.**

Mailing Address: Internal Revenue Service
Attn.: Voluntary Disclosure Coordinator
2970 Market Street
1-D04-100
Philadelphia, PA 19104

Fax Number: 267-466-1115

Part I - Preclearance Request (Mail or FAX Part I Only to Above)

1. Part I submission date	2. Person submitting disclosure (check box that applies)				
	<input type="checkbox"/> Individual(s)	<input type="checkbox"/> Partnership	<input type="checkbox"/> Corporation	<input type="checkbox"/> Trust	<input type="checkbox"/> Executor

3. Disclosure special features (check all that apply)

<input type="checkbox"/> Domestic Issues	<input type="checkbox"/> Estate & Gift Issues	<input type="checkbox"/> Virtual Currency Issues
<input type="checkbox"/> Offshore Issues	<input type="checkbox"/> Employment Tax Issues	<input type="checkbox"/> Other Issues (briefly describe)

Briefly describe issue

4a. Taxpayer name	b. Identification number (SSN/ITIN/EIN)	c. Date of birth
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d. Telephone number	e. Number, street, and room or suite number		
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f. City or town	g. State or province	h. ZIP/Foreign postal code	i. Country
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j. Occupation	k. Passport information (list all passport numbers and countries)
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5a. Spouse name (if joint disclosure)	b. Identification number (SSN/ITIN)	c. Date of birth
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d. Telephone number	e. Number, street, and room or suite number (complete 5d through 5i if different than 4d through 4i)		
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f. City or town	g. State or province	h. ZIP/Foreign postal code	i. Country
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j. Occupation	k. Passport information (list all passport numbers and countries)
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6a Representative's name (attach Form 2848, if applicable)	<input type="checkbox"/> Check if no representative	b. Telephone number
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c. FAX number	d. Number, street, and room or suite number		
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e. City or town	f. State or province	g. ZIP/Foreign postal code	h. Country
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7. List any entities (corporations, partnerships, etc.) for which you are making a disclosure, include EIN if applicable. Further identification information for these entities will be required in Part II of this application

8. Do you believe that the IRS has obtained information concerning your tax liability Yes No

If "Yes," specify

9. Disclose if you, your spouse or any related entities are currently under audit or criminal investigation by the Internal Revenue Service or any other law enforcement authority and if any income is sourced from an illegal activity

	Taxpayer		Spouse			Related Entities		
	Yes	No	Yes	No	N/A	Yes	No	N/A
a. Has the IRS notified you, your spouse or any related entities that it intends to commence an examination or criminal investigation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Are you, your spouse or any related entities under criminal investigation by the Internal Revenue Service	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Are you, your spouse or any related entities under criminal investigation by any law enforcement authority	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Do you, your spouse or any related entities have income sourced from an illegal activity	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If "Yes" to any, explain

10. Schedule of financial accounts

- List ALL noncompliant financial accounts you owned or controlled or were the beneficial owner of, either directly or indirectly.
 - The listings must cover the entire disclosure period as outlined in the Updated Voluntary Disclosure Practice Memorandum dated November 20, 2018.
 - This includes opened and closed accounts which held unreported funds during the disclosure period.
 - This includes accounts held through entities you owned or controlled or were the beneficial owner of, either directly or indirectly. **Note:** The entities will be further identified in Part II of this application.
- Disclose all account numbers held at each financial institution.
 - Organize the account numbers in order of who held the account. Jointly held accounts should be identified as such and only listed once.
 - Account holders must match the disclosing taxpayer(s) from Lines 4 and 5, or an entity on Line 7 that will be subsequently disclosed in more detail in Part II after pre-clearance is received
 - If an account is closed, mark it with a "(CL)" after the account number.
 - Detailed Example: John Smith – 2023245454534, 342345845454 (CL), 3423423434343
Jane Smith – 3423233443232, 523124523123
Joint (John and Jane Smith) – 23124523163,23453232326
ABC Ltd – 3433423343344
- Click "Add Financial Account" button below for additional financial institutions.

Financial Institution 1

Financial institution name (complete bank legal name, including all suffixes (e.g., Inc., A.G., S.A., etc.), DBAs and pseudonyms)

Telephone number	Number, street, and room or suite number		
City or town	State or province	ZIP/Foreign postal code	Country

Accounts numbers

Important:

- CI will provide a case control number that is required to submit Part II.
- Only submit Part II and attachments after preclearance is received.
- Do not send returns and/or remit payments with this form. No returns or payments will be accepted by IRS-Criminal Investigation.
- Complete all fields. If you cannot complete a field, attach a statement explaining why.
- Wait for contact from IRS examiner who will request additional documentation.

Part II - Voluntary Disclosure (Mail or FAX Part II to Address or FAX Number on Page 1)

Taxpayer name	Identification number	Telephone number
Spouse name (if joint disclosure)	Identification number	Telephone number
Representative's name (attach Form 2848, if applicable)	<input type="checkbox"/> Check if no representative	Telephone number
1. Part II submission date	2. Case control number (required from preclearance approval)	

3. Identify the source of funds (check all that apply and explain below)

- U.S. source Foreign source Illegal source Gift/Inheritance Virtual Currency Other

4. During the disclosure period, have you taken a position that you were a bona fide resident of a U.S. territory (e.g., American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands) or did you file an income tax return with a U.S. territory Yes No

If "Yes," list the territory and tax years

5. Provide estimated total annual **unreported income** during the disclosure period (for fields 5 and 6, input all amounts in U.S. Dollars using year-end exchange rates AND provide the most recent 6 years unless the noncompliance was for a shorter period)

Tax year	Unreported income	Tax year	Unreported income	Tax year	Unreported income
Tax year	Unreported income	Tax year	Unreported income	Tax year	Unreported income

6. Provide estimated annual range of the highest aggregate value of your offshore holdings (*Offshore Issues Only*)

Tax year	Highest aggregate account/Asset value	Tax year	Highest aggregate account/Asset value
Tax year	Highest aggregate account/Asset value	Tax year	Highest aggregate account/Asset value
Tax year	Highest aggregate account/Asset value	Tax year	Highest aggregate account/Asset value

7. Offshore issues only (check appropriate boxes)

	Taxpayer		Spouse	
	Yes	No	Yes	No
a. Has anyone, including a foreign government or a foreign financial institution, advised you that your offshore account records, which are the subject of this voluntary disclosure, were susceptible to being turned over to the U.S. Government pursuant to an official request	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. If 7a is "Yes," did you or anyone on your behalf submit documents in opposition	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. If 7b is "Yes," were copies of those documents provided to the Attorney General of the United States as required by 18 USC §3506	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

8. Schedule of entities

- List **ALL** entities you owned or controlled or were the beneficial owner of, either directly or indirectly for which you reported noncompliant financial accounts in the Part I preclearance request.
- The listings must cover the entire disclosure period as outlined in the Updated Voluntary Disclosure Practice Memorandum dated November 20, 2018.
- Click "Add Entity" button below for additional entities.

Entity 1

Entity name (including all DBAs and pseudonyms)		Identification number	Country of incorporation
Telephone number	Number, street, and room or suite number		
City or town	State or province	ZIP/Foreign postal code	Country

9. Narrative (Your narrative must truthfully and fully explain your noncompliance from inception to the present. Organize the narrative with the following headings: (1) Noncompliance, (2) Taxpayer Background and (3) Professional Advisors. "Noncompliance" must include a complete and thorough discussion of all Title 26 and Title 31 failures to report income, pay tax, and submit all required information returns and reports. Address the source of all unreported income. Explain the use of nominees, alter egos, and any other methods used to conceal your noncompliance. Completely identify all entities involved in your noncompliance. "Taxpayer Background" must include all aspects of personal and professional history. "Professional Advisors" must include complete details on attorneys, accountants, financial planners, private bankers, etc. that rendered services to you from the inception of the noncompliance to the present, regardless of their connection to or knowledge of your noncompliance. If your disclosure involves offshore issues, provide a complete story about your foreign financial assets. The field below will automatically expand to accommodate your narrative.)

Note: You must provide specific facts on this form or on a signed attachment providing a complete story about your tax fraud and willful noncompliance. Any submission that does not contain a narrative statement of facts will be considered incomplete.

By signing this document, I certify that I am willing to continue to cooperate with the Internal Revenue Service, including in assessing my income tax liabilities and making good faith arrangements to pay all taxes, interest, and penalties associated with this voluntary disclosure.

Under penalties of perjury, I declare that I have examined this document and accompanying schedules and statements and to the best of my knowledge and belief, they are true, correct, and complete.

Signature of taxpayer	Name (print/type)	Date
Signature of taxpayer's spouse	Name (print/type)	Date

Signature must be original (must be mailed), preferably in blue ink. Photocopied, facsimile, or electronic signatures are not acceptable. The power of attorney may not sign the voluntary disclosure letter on behalf of the taxpayers.

IRS reserves the right to make further contacts with the taxpayer to clarify his/her submission.

Privacy Act and Paperwork Reduction Act Notice

We ask for the information on this foreign account or asset statement to carry out the Internal Revenue laws of the United States. Our authority to ask for information is sections 6001, 6109, 7801, 7803 and the regulations thereunder. This information will be used to determine and collect the correct amount of tax under the terms of the offshore voluntary disclosure program. You are not required to apply for participation in the offshore voluntary disclosure program. However, if you choose to apply you are required to provide all the information requested on the offshore voluntary disclosure letter.

You are not required to provide the information requested on a document that is subject to the Paperwork Reduction Act unless the document displays a valid OMB control number. Books or records relating to a document or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103. Section 6103, however, allows or requires the Internal Revenue Service to disclose or give this information to others as described in the Internal Revenue Code. For example, we may disclose this information to the Department of Justice to enforce the tax laws, both civil and criminal, and to cities, states, the District of Columbia, and U.S. commonwealths or possessions to carry out their tax laws. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism. Failure to provide this information may delay or prevent processing your application. Providing false information may subject you to penalties.

The time needed to complete and submit the foreign account or asset statement will vary depending on individual circumstances. The estimated average time is: 2 hour.

If you have comments concerning the accuracy of this time estimate or suggestions for making the foreign account or asset statement simpler, we would be happy to hear from you. Comments should be sent to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224.