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

17.01 STATUTORY LANGUAGE

[Note: the language of the "omnibus clause" is italicized.]

§ 7212. Attempts to interfere with administration of 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 . . ., or imprisoned not more than three years or both . . . .[1]

17.02 GENERALLY

26 U.S.C. § 7212(a) contains two clauses. ***United States v. Pansier***, 576 F.3d 726, 734 (7th Cir. 2009). The first clause prohibits threats or forcible endeavors designed to interfere with federal agents acting pursuant to Title 26. *E.g.*, ***United States v. Przybyla***, 737 F.2d 828, 829 (9th Cir. 1984). The second and more general clause, known as the "omnibus clause," prohibits any act that corruptly obstructs or impedes, or endeavors to obstruct or impede, the due administration of the Internal Revenue Code. ***United States v. Bostian***, 59 F.3d 474, 476-77 (4th Cir. 1995); ***United States v. Koff***, 43 F.3d 417, 418 (9th Cir. 1994); ***United States v. Popkin***, 943 F.2d 1535, 1539 (11th Cir. 1991); ***United States v. Williams***, 644 F.2d 696, 699 (8th Cir. 1981), *superseded on other grounds by statute*, Pub. L. No. 98-369, Div. A, Title I, § 159(a), 98 Stat. 696 (1984).

Section 7212(a) applies broadly to the variety of conduct used to attempt to prevent the IRS from carrying out its lawful functions and to avoid the proper assessment and payment of taxes:

[1] Under 18 U.S.C. § 3571, the maximum fine for felony offenses under Section 7212(a) 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 a 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.

> 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." [***United States v.***] ***Martin***, 747 F.2d [1404,] . . . 1409 [(11th Cir. 1984)]. We believe that § 7212(a) is such a statute and that the use of "in any other way corruptly" in the second clause gives clear notice of the breadth of activities that are proscribed. ***United States v. Popkin***, 943 F.2d 1535, 1540 (11th Cir. 1991).[2]

17.03 TAX DIVISION POLICY

The omnibus clause generally should not be used as a substitute for a charge directly related to tax liability, such as tax evasion or filing false claims, if such charge is readily provable. The omnibus clause may be used to supplement other charges, however, and is particularly appropriate to punish defendants for conduct that obstructs or impedes IRS personnel or operations, including audits, collection efforts, and criminal investigations. When a defendant engages in conduct intended to obstruct or delay IRS operations or tax enforcement and collections, he or she may be prosecuted under Section 7212(a) regardless of whether he or she also is prosecuted for conspiracy or other crimes. A charge under the omnibus charge may also be appropriate to prosecute a person who, prior to any audit or investigation, engaged in large-scale obstructive conduct involving the tax liability of third parties.

Perjury or obstruction of justice charges are generally preferable to section 7212(a) charges for conduct that obstructs an ongoing grand jury investigation.

Please refer to Directive 129 for a full discussion of the Tax Division position on the use of 26 U.S.C. § 7212(a).

[2] Some conduct reached by Section 7212(a) also falls within 18 U.S.C. 1521, which proscribes filing, attempting to file, or conspiring to file, in any public record or in any private record which is generally available to the public, any false lien or encumbrance against the real or personal property of a law enforcement officer, on account of the performance of official duties by the officer, with knowledge or reason to know that the lien or encumbrance is false or contains any materially false, fictitious, or fraudulent statement or representation. Section 1521 provides for a fine or imprisonment for a maximum of 10 years or both. In cases arising under the internal revenue laws, prosecution or a grand jury investigation must be authorized by the Tax Division.

17.04 ELEMENTS OF THE OMNIBUS CLAUSE

To establish a Section 7212(a) omnibus clause violation, the government must prove beyond a reasonable doubt that the defendant in any way (1) corruptly (2) endeavored (3) to obstruct or impede the due administration of the Internal Revenue Code. *See, e.g.*, ***United States v. Marek***, 548 F.3d 147, 150 (1st Cir. 2008). ***United States v. Winchell***, 129 F.3d 1093, 1098 (10th Cir. 1997); ***United States v. Wilson***, 118 F.3d 228, 234 (4th Cir. 1997); ***United States v. Hanson***, 2 F.3d 942, 946-47 (9th Cir. 1993); ***United States v. Williams***, 644 F.2d 696, 699 (8th Cir. 1981), *superseded on other grounds by statute*, Pub. L. No. 98-369, Div. A, Title I, § 159(a), 98 Stat. 696 (1984); *see also* Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Instruction 97, at p. 566 (2003).

A panel of the Sixth Circuit has held that obstruction of the IRS "requires some pending IRS action of which the defendant was aware." ***United States v. Kassouf***, 144 F.3d 952, 957 (6th Cir. 1998). This pending action "may include, but is not limited to, subpoenas, audits or criminal tax investigations." ***United States v. Kassouf***, 144 F.3d at 957 n.2. However, in a later decision, the Sixth Circuit limited ***Kassouf*** "to its precise holding and facts" and upheld an omnibus clause conviction of a defendant who filed false Forms 1099 and 1096, although there was no pending IRS action. ***United States v. Bowman***, 173 F.3d 595, 600 (6th Cir. 1999).[3] The Ninth Circuit has held that there is no requirement that the defendant was aware of an ongoing tax investigation. ***United States v. Massey***, 419 F.3d 1008, 1010 (9th Cir. 2005) (citing ***United States v. Kuball***, 976 F.2d 529, 531 (9th Cir. 1992)); *see also* ***United States v. Armstrong***, 974 F. Supp. 528, 536 (E.D. Va. 1997) (specifically rejecting holding in ***Kassouf***).

Section 7212(a) does not include any language requiring that the defendant acted willfully. The Second Circuit has upheld a district court's refusal to give a *Cheek* willfulness instruction, noting that Section 7212(a) does not include that term and opining that the district court's instructions as to "corruptly" and "endeavors" were "as comprehensive and accurate as if the word 'willfully' was incorporated in the statute." ***United States v. Kelly***, 147 F.3d 172, 177 (2d Cir. 1998).

[3] The ***Kassouf*** court was concerned that a broad reading would "permit[] the IRS to impose liability for conduct which was legal (such as failure to maintain records) and occurred long before an IRS audit, or even a tax return was filed." ***Kassouf***, 144 F.3d at 957. In ***Bowman***, the court noted that filing false forms with the IRS is not legal, and that the defendant attempted to initiate IRS action against others. ***Bowman***, 173 F.3d at 600.

17.04[1] Corruptly

To act "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. Phipps***, 595 F.3d 243, 247 (5th Cir 2010); ***United States v. Thompson***, 518 F.3d 832, 855 (10th Cir. 2008); ***United States v. Reeves* (*Reeves I*)**, 752 F.2d 995, 998, 1001 (5th Cir. 1985) (cited with approval in ***United States v. Popkin***, 943 F.2d 1535, 1540 (11th Cir. 1991)). In ***Reeves I***, the Fifth Circuit 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 already "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. Valenti***, 121 F.3d 327, 332 (7th Cir. 1997); ***United States v. Hanson***, 2 F.3d 942, 946-47 (9th Cir. 1993); ***United States v. Yagow***, 953 F.2d 423, 427 (8th Cir. 1992).

A broad reading of the term "corruptly" is supported 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). "[S]ection 7212(a) is directed at efforts to bring about a particular advantage such as impeding collection of one's taxes, the taxes of another, or the auditing of one's or another's tax records," ***Reeves I***, 752 F.2d at 998, or securing an unwarranted financial gain, ***United States v. Dykstra***, 991 F.2d 450, 453 (8th Cir. 1993). 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. The acts themselves need not be illegal, as long as the defendant commits them to secure an unlawful benefit for himself or for others. ***United States v. Wilson***, 118 F.3d 228, 234 (4th Cir. 1997) (citing ***Bostian***, 59 F.3d 474, 479 (4th Cir. 1995)).

Examples of corrupt endeavors within the meaning of Section 7212(a), as found by the courts of appeals include:

- Filing a false complaint against an IRS Revenue Agent. ***United States v. Martin***, 747 F.2d 1404, 1410-11 (11th Cir. 1984).

- Making statements, whether threats or not, designed to persuade witnesses not to talk to IRS employees or cooperate with an IRS investigation. ***United States v. Valenti***, 121 F.3d 327, 331-32 (7th Cir. 1997).

- Attempting to interfere with an auction of property to pay a tax debt, by filing a *lis pendens* action and distributing copies of the notice to prospective buyers. ***United States v. Bostian***, 59 F.3d 474, 479 (4th Cir. 1995).

- Backdating documents and using nominees in order to conceal assets and disguise the nature of income. ***United States v. Wilson***, 118 F.3d 228, 234 (4th Cir. 1997); *see also* ***United States v. Madoch***, 108 F.3d 761, 762 (7th Cir. 1997) (executing multiple bogus refund schemes); ***United States v. Workinger***, 90 F.3d 1409, 1411, 1414 (9th Cir. 1996) (submitting false financial statements to IRS officers).

- Filing fraudulent petition to place IRS revenue agent assigned to girlfriend's case into involuntary bankruptcy. ***United States v. McBride***, 362 F.3d 360, 372 (6th Cir. 2004).

- Filing fraudulent Forms 1099 claiming that defendant paid compensation to IRS employees and others. ***United States v. Dykstra***, 991 F.2d 450, 451-53 (8th Cir. 1993); ***United States v. Winchell***, 129 F.3d 1093, 1098-99 (10th Cir. 1997); ***United States v. Kuball***, 976 F.2d 529, 530-31 (9th Cir. 1992).

In ***United States v. Dykstra***, 991 F.2d 450 (8th Cir. 1993), the defendant sent IRS officials involved in a collection action Forms 1099 that falsely indicated that the defendant had paid the officials non-employee compensation. The defendant then notified the IRS that the officials failed to pay taxes on that compensation and requested a reward for supplying the information. 991 F.2d at 451. The court of appeals held that the defendant acted corruptly because he attempted to secure "an unwarranted financial gain for himself" by preventing the IRS from seizing his home to satisfy his tax outstanding liability and by attempting to obtain rewards from the IRS for reporting alleged tax violations. ***Dykstra***, 991 F.2d at 453. Another court, discussing a similar scheme, reasoned that "[t]he fact that the taxpayer may claim sums which are rationally

'preposterous' does not obviate a corrupt intent." ***United States v. Winchell***, 129 F.3d 1093, 1099 (10th Cir. 1997) (citing ***Kuball***, 976 F.2d at 530-31; ***United States v. Yago*w**, 953 F.2d 423, 425-27 (8th Cir. 1992)).

The defendant need not seek a financial benefit in order to satisfy the element of acting "corruptly." In ***United States v. Yagow***, 953 F.2d 423, 425 (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, the defendant argued that the prosecution had failed to prove that he acted "corruptly," because there was no evidence that he had sought a financial advantage from his Form 1099 scheme. 953 F.2d at 426-27. The Eighth Circuit suggested, without holding, that the government need not prove that the defendant sought or gained a financial advantage:

> 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.

In ***United States v. Reeves* (*Reeves II*)**, 782 F.2d 1323 (5th Cir. 1986), the Fifth Circuit concluded that attempting to divert the time and attention of an IRS agent from pursuing a tax investigation against the defendant was sufficient to establish that the defendant had acted "corruptly" for purposes of Section 7212(a). 782 F.2d at 1326. However, 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:

> [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 omitted).

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 section 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 victims of the Form 1099 scheme in ***Dykstra*** were not government agents. The Eighth Circuit held that the Section 7212(a) charge properly included the defendant's actions against those victims. *See also* ***United States v. Lovern***, 293 F.3d 695, 700 n.5 (4th Cir. 2002) (noting that Section 7212(a) omnibus clause does not require that the victim of the threat be an officer or employee of the United States).

"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 defendant, a U.S. Fish and Wildlife Service employee, applied for tax-exempt status for an organization known as American Ecological Union (AEU). The defendant claimed on the application for tax-exemption that AEU "would provide benefits and services related to its exempt function of promoting and facilitating scientific research in the area of ecology." 985 F.2d 1276-77. The indictment alleged that the statement of purpose in AEU's application was false and that, in fact, AEU arranged big-game hunting trips in Pakistan and China. The government further alleged that the defendant falsely claimed that AEU was paid tax-deductible "contributions," when the payments were actually taxable income. 985 F.2d at 1277. The indictment charged that the defendant's activities comprised an "artifice and scheme to defraud the United States," which constituted a corrupt endeavor to impede and obstruct the due administration of the tax laws in violation of 26 U.S.C. § 7212(a). 985 F.2d at 1277. The district court granted the defendant's motion to dismiss the charge, concluding that "Section 7212(a) required that kind of corruption that goes to a particular officer or employee." 985 F.2d at 1277 (internal quotation omitted). The government appealed, and the Fourth Circuit reversed. 985 F.2d at 1278. The court of appeals 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 definition of "corruptly." ***Mitchell***, 985 F.2d at 1278. *Accord* ***United States v. Mubayyid***, 658 F.3d 358 (1st Cir. 2011) (answering questions falsely on form regarding tax-exempt matters).

An endeavor may be corrupt even when it involves means that are not illegal in themselves. ***Mitchell***, 985 F.2d at 1278-79 (citing cases); ***Popkin***, 943 F.2d at 1537 (creating a corporation "expressly for the purpose of enabling [one of defendant's clients]

to disguise the character of illegally earned income and repatriate it from a foreign bank" is corrupt).

17.04[2] Endeavors

The second element of the omnibus clause of section 7212(a) is "endeavors." To help define this term for purposes of Section 7212(a), courts have looked to case law interpreting similar language in the obstruction of justice statutes, 18 U.S.C. §§ 1503 and 1505. *See* ***United States v. Martin***, 747 F.2d 1404, 1409 (11th Cir. 1984); ***United States v. Williams***, 644 F.2d 696, 699 n.11 & 700 (8th Cir. 1981), *superseded on other grounds by statute*, Pub. L. No. 98-369, Div. A, Title I, § 159(a), 98 Stat. 696 (1984). The Eleventh Circuit has defined "endeavor" as "'any effort . . . to do or accomplish the evil purpose that section was intended to prevent.'" ***Martin***, 747 F.2d at 1409 (quoting ***Osborn v. United States***, 385 U.S. 323, 333 (1966) (alteration in original)).[4]

The means by which a defendant can "endeavor" to impede the due administration of the internal revenue laws are 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. For example, in ***Martin***, a taxpayer knowingly filed a false complaint alleging that the IRS revenue agent assigned to his audit engaged in misconduct, including drug use. 747 F.2d at 1406-07. The Eleventh Circuit affirmed the defendant's Section 7212(a) conviction, holding that filing a false complaint was an endeavor to impede the due administration of the internal revenue laws. ***Id***.; *cf*. ***United States v. Hylton***, 710 F.2d 1106, 1110-11 (5th Cir. 1983) (Section 7212(a) conviction cannot be based on non-fraudulent, factually accurate complaint against IRS agents).

In ***United States v. Williams***, the Eighth Circuit held that "[S]ection 7212's omnibus clause plainly comprehends" that "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." 644 F.2d at 701. Likewise the First Circuit observed that

[4] Other courts have defined "endeavor" for purposes of 18 U.S.C. § 1503 as any conduct with the "natural and probable effect" of obstructing justice. *See*, *e.g.*, *United States v. Barfield*, 999 F.2d 1520, 1523 & n.4 (11th Cir. 1993).

"supplying false documents knowing that the documents will be used to deceive the IRS during an audit is a quintessential violation of the statute." ***United States v. Marek***, 548 F.3d 147, 150 (1st Cir. 2008).

The Form 1099 scheme previously described in Section 17.04[1] is frequently used to impede the administration of the internal revenue laws. In ***United States v. Yagow***, 953 F.2d 423, 425 (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, falsely claiming that he had paid the officials non-employee compensation. The defendant also filed the Forms 1099 with the IRS. ***Id***. The Eighth Circuit held that the scheme constituted an attempt to impede the administration of the tax laws and therefore the offense was properly charged under Section 7212(a). ***Id***. at 427-28; *see also* ***United States v. Dykstra***, 991 F.2d 450, 453 (8th Cir. 1993); ***United States v. Rosnow***, 977 F.2d 399, 410 (8th Cir. 1992) (submission of false Forms 1099 to IRS agents and filing false currency transaction reports and federal tort claims against investigative agents); ***United States v. Kuball***, 976 F.2d 529, 530-31 (9th Cir. 1992).

A number of other activities also have been found to violate the omnibus clause. *See* ***United States v. Wilson***, 118 F.3d 228, 234-36 (finding violation based on false backdated notes created by an attorney to support a client's attempt to evade paying tax owed during an IRS audit); ***United States v. Higgins***, 987 F.2d 543, 544 (8th Cir. 1993) (implying that 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 constituted violation of omnibus clause); ***United States v. Shriver***, 967 F.2d 572, 573-74 (11th Cir. 1992) (noting that defendant had been convicted under Section 7212(a) for transferring real estate into spouse's name and filing an altered lien notice in attempt to release IRS lien); ***United States v. Popkin***, 943 F.2d 1535, 1540-41 (11th Cir. 1991) (finding violation based on shell corporation created by an attorney to help a client hide money from the IRS); ***United States v. Hammerman***, 528 F.2d 326, 328 (4th Cir. 1975) (noting that plea under Section 7212(a) was based on defendant's role as "bagman" in tax evasion scheme). Other endeavors may involve the use of fictitious financial instruments to pay taxes;[5] filing fraudulent lawsuits against IRS officials or others; interfering with the sale of foreclosed property; fraudulently causing federal tax

[5] Note that the use of fictitious financial instruments may be both an endeavor to obstruct the due administration of the Internal Revenue Code and a separate substantive offense under 18 U.S.C. § 514 (fictitious obligations).

liens to be released; or filing fraudulent liens or UCC-1 financing statements against IRS officials or others.[6]

Prosecutors should not charge the failure to file a tax return as an endeavor. See ***United States v. Wood***, No. 09-4080, 2010 WL 2530732 (10th Cir. June 24, 2010).

17.04[3] 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 records." ***United States v. Reeves***, 752 F.2d 995, 998 (5th Cir. 1985); ***United States v. Kuball***, 976 F.2d 529, 531 (9th Cir. 1992). There is no requirement that a defendant's actions have an adverse effect on the government's investigation or process. ***United States v. Rosnow***, 977 F.2d 399, 409 (8th Cir. 1992). 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. 977 F.2d at 403-04. The defendants claimed that they could not be convicted under the omnibus clause, because they did not successfully impede the IRS investigation. 977 F.2d at 409. The Eighth Circuit held that filing false Forms 1099 was an attempt to impede the IRS investigation and that the conduct therefore was punishable under Section 7212(a) even though the attempt ultimately proved unsuccessful. ***Id***.

Tax administration encompasses a "vast range of activities," including "mailing out internal revenue forms; answering taxpayers' inquiries; receiving, processing, recording and maintaining tax returns, payments and other taxpayers[']submissions; as well as monitoring taxpayers' compliance with their obligations" ***United States v. Bowman***, 173 F.3d 595, 600 (6th Cir. 1999). There is no requirement that a defendant attempt to impede the IRS on his or her own behalf; impeding the IRS on behalf of another violates the omnibus clause. *See* ***United States v. McBride***, 362 F.3d 360, 372-73 (6th Cir. 2004) (defendant attempted to impede IRS on behalf of girlfriend); ***United States v. Popkin***, 943 F.2d 1535, 1540-41 (11th Cir. 1991) (attorney attempted to impede IRS on behalf of client).

[6] Note that the filing of false liens against federal employees, including federal judges, may be both an endeavor to obstruct the due administration of the Internal Revenue Code and a separate crime under 18 U.S.C. § 1521.

A defendant may violate the omnibus clause without taking some action against a government agent. A violation of the omnibus clause occurs whenever a defendant intends to impede the administration of the tax laws. The clause should be read broadly to include behavior that is not directed at IRS officials. ***United States v. Mitchell***, 985 F.2d 1275, 1278-79 (4th Cir. 1993); *see also* ***United States v. Lovern***, 293 F.3d 695, 700 n.5 (4th Cir. 2002) (violation of omnibus clause "does *not* require that the victim of the threat be an officer or employee of the United States or that he be acting in an official capacity") (emphasis in original).

17.05 VENUE

Venue for a Section 7212(a) prosecution lies in the district in which the defendant committed the corrupt act or acts constituting an endeavor to impede the administration of the Internal Revenue Code. *See* 18 U.S.C. § 3237. For a further discussion of venue rules, please see Section 6.00, *supra*.

17.06 STATUTE OF LIMITATIONS

The general rule under 26 U.S.C. § 6531 is that tax offenses are subject to a three-year statute of limitations period. However, Section 6531(6) provides a six-year statute of limitations for "the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States)." In ***United States v. Workinger***, 90 F.3d 1409 (9th Cir. 1996), the defense argued that Section 6531(6) does not apply to the omnibus clause, because the parenthetical language limits the scope of the six-year limitations exception to offenses involving intimidation of officers and employees of the United States. 90 F.3d at 1412-13. The Ninth Circuit, after analyzing the language and structure of the statute, rejected this argument and held that "the parenthetical language in § 6531(6) is descriptive, not limiting." ***Workinger***, 90 F.3d at 1414. *Accord* ***United States v. Kelly***, 147 F.3d 172, 177 (2d Cir. 1998); ***United States v. Wilson***, 118 F.3d 228, 236 (4th Cir. 1997).

Accordingly, the statute of limitations for an omnibus clause offense will run six years from the last act that constitutes a corrupt endeavor to impede and impair the due administration of the tax code. 26 U.S.C. § 6531(6); ***United States v. Wilson***, 118 F.3d at 236. For a full discussion of the statute of limitation in criminal tax offenses, see Section 7.00, *supra*.

17.07 SENTENCING GUIDELINES

The Sentencing Guidelines direct a sentencing court to apply either the Obstruction of Justice guideline (Section 2J1.2) or the Tax Evasion guideline (Section 2T1.1) to offenses under the omnibus clause. USSG App. A. The court is to use the guideline provision "most appropriate for the offense conduct charged in the count of which the defendant was convicted." USSG App A, intro. comment.

The general obstruction of justice guideline (Section 2J1.2) may be the most appropriate sentencing guideline to be applied to Section 7212(a) violations, particularly in cases in which no tax loss resulted from the defendant's conduct. *See*, *e.g.*, ***United States v. Koff***, 43 F.3d 417, 419 (9th Cir. 1994); ***United States v. Van Krieken***, 39 F.3d 227, 231 (9th Cir. 1994).

Courts have also sentenced Section 7212(a) violations under Part 2T of the sentencing guidelines. *See* ***United States v. Kelly***, 147 F.3d 172, 178 (2d Cir. 1998); ***United States v. Hanson***, 2 F.3d 942, 947 (9th Cir. 1993). These guidelines may be more appropriate where the defendant's obstructive conduct was part of an effort to evade taxes or where measurable tax loss resulted from the obstruction.[7]

For a more complete discussion of sentencing issues in criminal tax cases see Chapter 43.00, *infra*.

[7] The Eleventh Circuit, in ***United States v. Shriver***, 967 F.2d 572, 573-74 (11th Cir. 1992), upheld the trial court's application of the fraud and deceit sentencing guideline, section 2F1.1, to the defendant's section 7212(a) violation, reasoning that it most closely tracked his efforts to defeat an IRS lien. ***Shriver*** was decided before the November 1993 amendment to Appendix A (Statutory Index) of the Guidelines, which stated that USSG §§2J1.2 and 2T1.1 were the Guidelines sections applicable to the omnibus clause of Section 7212(a). *See* USSG App. C, Amend. 496. The Eleventh Circuit has not been called on to decide whether ***Shriver*** remains good law in light of the change to the Guidelines.