

**Office of Chief Counsel
Internal Revenue Service**
memorandum

CC:PA:02:SDMurray
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to: Carol G. Walker
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Attention: James A. Marlow

from: Pamela Wilson Fuller
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(Procedure & Administration)

subject: Validity of Tax Returns Filed with Stolen Social Security Numbers

This advice responds to your request for assistance dated January 6, 2011. This advice may not be used or cited as precedent.

ISSUES

1. Whether a taxpayer's individual income tax return that identifies the taxpayer by using a stolen or misappropriated social security number of someone else is a valid return that when filed starts the time for assessment of tax.
2. Assuming the tax return is invalid, whether for assessment purposes the IRS can treat the return as filed at the time (or anytime after) the IRS discovers the falsehood, rather than the original date of filing.

CONCLUSIONS

1. A taxpayer's misuse on an income tax return of another individual's SSN as the taxpayer's identifying number does not alone invalidate the return. If the tax return otherwise meets the established criteria for a valid return, the filing of the return will start the period for assessment, despite the false identifying number.
2. Given the conclusion on the first issue, the second issue is moot, as it is premised on our having reached an opposite conclusion. Also, because an invalid return is a nullity, nothing is "filed," hence there is no filing date that is even potentially susceptible

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to change or to being deemed as occurring on a date after the invalid return is received in a Service Center.

FACTS

You requested this advice in connection with the processing of a certain category of identity-theft returns and the associated assessment of tax. These returns are typically filed by undocumented aliens who live and work in the United States but are here illegally. Because of their status, the workers do not have and are ineligible for an SSN. Presumably they also have not applied for and do not have an ITIN. With no number that identifies them as taxpayers, they sometimes provide to their employers for wage withholding and information reporting a stolen or misappropriated SSN of a person with the same name or one that closely matches. In the type of cases you are concerned with, the worker also uses the stolen or misappropriated SSN to file an individual income tax return reporting the earnings and the federal tax withheld. Additional income, as well as deductions and credits, may be included on the return, and the taxpayer will usually report an overpayment and claim a refund. Aside from the false SSN, the returns are unremarkable: they are filed in the taxpayer's real name, with a bona fide mailing address; they are complete (and computationally accurate) or substantially so; they are signed by the taxpayer under penalty of perjury; and they are not altered (such as to the jurat) and do not assert frivolous positions.

Because they appear to be ordinary returns, and unless the IRS has suspicions otherwise, the IRS generally processes the returns as it normally does, including mailing a refund check to the filer at the address provided or depositing the refund in an account designated on the return. The IRS understandably treats the return as that of the rightful holder of the SSN. The IRS creates an IMF account for the tax year of the return under the SSN given and posts to the account the filing of the return and subsequent transactions. The rightful holder of the SSN is most likely unaware of what has happened (and may even be unaware of the underlying identity theft). Similarly, the first time that the IRS recognizes a problem may be when the rightful holder of the SSN files a return for the same period.¹ Communications with the rightful holder of the SSN ultimately will reveal that the first return is an identity-theft return. At that point, the IRS must correct the rightful holder's account, including reversing the erroneous transactions and abating any assessments. At the same time, the IRS can create a new tax account for the identity-theft return using an administratively generated TIN assigned to the filer. The same return-based assessments conceivably can be made on the new account. By then, however, the three-year period to assess (if it applies) the identity-theft return may be over; this could result, for example, if the second return, which raises the red flag, is filed very late or if the resulting investigation and eventual resolution are delayed or protracted.

¹ The factual situation presupposes, of course, that the return with the false SSN is filed first.

LAW AND ANALYSIS

The limitations period to assess tax is generally three years after a tax return is filed (a return filed early is considered “filed” on the due date). I.R.C. § 6501(a), (b)(1). To start the period, a taxpayer must file a valid tax return. *Agri-Cal Venture Assocs. v. Commissioner*, T.C. Memo. 2000-271; *In re McKay*, 430 B.R. 246 (Bank. M.D. Fla. 2010). If a return is invalid, the limitations period does not begin and tax may be assessed at any time. *Bachner v. Commissioner*, 81 F.3d 1274, 1280 (3d Cir. 1996); I.R.C. § 6501(c)(3). Indeed, a purported return that is invalid is a non-return, a “nullity.” *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 180 (1934). As such, it is basically invalid for all tax purposes, not just the time for assessment. *Southern Sportswear Co. v. Commissioner*, 10 T.C. 402, 405-06 (1948), *vacated and remanded on other grounds*, 175 F.2d 779 (6th Cir. 1948) (per curium).

To be valid, a return must satisfy the well-known four-part *Beard* test: (1) the information on the return must be sufficient for the IRS to calculate tax liability; (2) the filed document must purport to be a return; (3) the return must be an honest and reasonable attempt to comply with the tax laws; and (4) the taxpayer must execute the return under penalties of perjury. *Beard v. Commissioner*, 82 T.C. 766, 777 (1984), *aff’d per curium*, 793 F.2d 139 (6th Cir. 1986). An imperfect return—one with mistakes or that is incomplete—can still be valid as a return of tax. *Oman v. Commissioner*, T.C. Memo. 2010-276 (citing *Zellerbach*, 293 U.S. at 180). Even a return that is in some way purposefully false or fraudulent is not necessarily invalid, *Badaracco v. Commissioner*, 464 U.S. 386 (1984), although as a matter of statutory exception (section 6501(c)(1)), the assessment period is unlimited if the taxpayer filed the false or fraudulent return with an intent to evade tax.

Certainly, taxpayers are under a general obligation to supply on a tax return whatever information is mandated on the form or in instructions or regulations. I.R.C. § 6011(a); Treas. Reg. § 1.6011-1(a); *Commissioner v. Lane-Wells Co.*, 321 U.S. 219, 223 (1944); *Parker v. Commissioner*, 365 F.2d 792, 800 (8th Cir. 1996). And a valid TIN is among the items of required information. I.R.C. § 6109(a); Treas. Reg. §§ 31.6109-1(a); Treas. Reg. § 301.6109-1(b)(1), (2); 2010 Form 1040 Instructions. Missing or incorrect information can affect the validity of a return, depending on how significant the defects are, but the operative question is whether the return as a whole complies with the *Beard* test. Notwithstanding the presence of a false identifying number, we conclude that the returns at issue comply with the *Beard* test based on their remaining characteristics. In particular, the return bears a signature, purports to be a return of tax, and overall represents a good-faith effort to comply with the internal revenue laws. It is not a frivolous submission or a sham.² If the return also contains enough information for the

² Contrast that with the other principal type of identity-theft return, by which an identity thief uses not only a stolen SSN but also the victim’s name and forged signature in an effort to fraudulently obtain a refund. In fact, the whole return or a large part of it may be fictitious. As we previously advised, such a return is a sham and is unquestionably invalid when analyzed under *Beard*. It is filed in subversion of the tax laws, not in conformance with them. Please note that if the problems with a taxpayer’s return go beyond a false SSN and tend toward the other type of identity-theft return, then we might reach a different conclusion

IRS to determine liability, the return is valid to start the assessment period. Any tax therefore must be assessed timely.

The *Beard* test is the dispositive authority for determining a return's validity. Even so, we looked for and not find any reported opinions factually on-point.³ Consistent with our conclusion, however, courts have articulated as a general principle that an "omission of isolated information not seriously hampering the IRS's ability to check a taxpayer's asserted tax liability—for example, the omission of a taxpayer's social security number or the nondisclosure of the names of one's dependent children—does not invalidate a return under section 7203 [or 6501]." *United States v. Grabinski*, 727 F.2d 681, 686-87 (8th Cir. 1984).

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

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about validity of the return. Also, exceptions could apply in some cases, such as section 6501(e)(1) (extending the assessment period to six years when there is an omission from gross income exceeding 25 percent).

³ The Tax Court in one case suggested in dicta that purported income tax returns that did not contain the taxpayer's SSN or postal address might be invalid, but the court did not reach the issue, holding instead that based on transcripts of account admitted into evidence the returns were never filed. *Lunn v. Commissioner*, T.C. Memo. 1987-435.