

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

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Acting Chief, Criminal Investigation

from: Edward F. Cronin
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(Criminal Tax)

subject: Disclosure Issues Related to Identity Theft

This memorandum addresses several disclosure issues stemming from the creation of an Identity Theft Task Force (“ITTF”) by the U.S. Attorney’s Office for the Southern District of Florida. The ITTF is comprised of federal agencies including the IRS, the U.S. Postal Service, Secret Service, and Immigration & Naturalization Service, as well as state and local law enforcement. The issues addressed herein take on particular importance given the proliferation of identity theft and other refund fraud schemes throughout the country.

ITTF intends to open a Title 18 grand jury investigation, in which the various federal agencies along with state and local law enforcement agents will participate. It is expected that some cases will be prosecuted in federal court and some in state court under federal and state identity theft and other non-tax statutes respectively. To prosecute an identity thief under the applicable non-tax federal or state statutes, it will often be necessary to introduce the “bad return” as evidence of the identity theft, which raises a number of disclosure questions. Given many of the issues are intertwined with I.R.C. § 6103, our advice has been closely coordinated with Procedure and Administration (“P&A”) and the analysis and conclusions below reflects their review subject to our clarifying comments related to Issue #3.

ISSUES

1. Whether an identity theft victim may obtain from the Service a copy of the “bad return” and other return information associated with the processing of the “bad return” filed by the alleged identity thief.
2. Whether I.R.C. § 6103(i)(3)(A) authorizes the disclosure of the “bad return” to federal law enforcement agencies with jurisdiction to enforce federal non-tax identity theft crimes.

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3. Whether state and local law enforcement agents who are assigned to the Department of Justice as part of title 26 and non-title 26 grand jury investigations may access return information under I.R.C. §§ 6103(h)(2) or (i)(1), (i)(2), and (i)(3)(A) respectively.¹
4. Whether an identity theft victim can consent to the disclosure of the “bad return” filed by the alleged identity thief to state and local law enforcement agencies in connection with state and local law enforcement investigations related to the identity theft.

CONCLUSIONS

1. Under I.R.C. § 6103(e)(7), an identity theft victim may obtain from the Service a copy of the “bad return” and other return information associated with the processing of the “bad return” filed by the alleged identity thief.
2. I.R.C. § 6103(i)(3)(A), which authorizes the disclosure of certain return information to federal agencies with jurisdiction to enforce federal non-tax crimes, allows the disclosure of the “bad return” to appropriate federal law enforcement agencies.
3. State and local law enforcement agents appointed (but not detailed) to the Department of Justice as part of title 26 and non-title 26 grand jury investigations may access return information under I.R.C. §§ 6103(h)(2) or (i)(1), (i)(2), and (i)(3)(A) respectively.²
4. Under I.R.C. § 6103(c), an identity theft victim may consent to the disclosure of the “bad return” filed by the alleged identity thief to state and local law enforcement agencies in connection with state and local law enforcement investigations related to the identity theft.

BACKGROUND

In a typical case, state and local law enforcement agencies come across loosely organized street gangs that have prepared and filed fraudulent Form 1040 individual tax returns using stolen identities of third parties. The members of the street gangs load prepaid access cards with the stolen refunds or cash the fraudulent refund checks and then use the fraudulently obtained proceeds. State or local law enforcement may

¹ While P&A focused on whether state and local law enforcement agents assigned to the Department of Justice as part of a Title 26 and non-Title 26 grand jury investigations may access return information under I.R.C. §§ 6103(h) or (i), we wish to clarify that the intended inquiry was whether task force officers detailed to the IRS and part of the ITTF Title 26 and non-Title 26 grand jury investigation may have access to I.R.C. § 6103 tax information.

² We clarify that state and local ITTF officers are detailed to the I.R.S. and not detailed, appointed or deputized to the Department of Justice.

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uncover the prepaid access cards, along with ledgers with various items of identifying information (name, date of birth, social security number) of victims during a routine car stop or during the course of a criminal investigation or arrest. State and local law enforcement agents may turn over such evidence to CI as a participant in the ITTF.

LAW AND ANALYSIS

The Status of a “Bad Return”

In the enactment of, and subsequent amendments to I.R.C. § 6103, Congress did not and has not expressly provided for the situation in which one individual files a fraudulent return using the name and/or taxpayer identification number of another individual. Nevertheless, even under the current statutory scheme, it is possible to delineate the separate interests involved and to assign “ownership” to the various items of information associated with an identity theft situation based upon existing principles.

Procedure and Administration has previously concluded that a “bad return” filed by an identity thief is not a valid return because it is not filed by the true taxpayer or with the taxpayer’s consent. Moreover, a “bad return” is not signed by the taxpayer in whose name the return is filed and accordingly, the “bad return” lacks a valid signature. See *Beard v. Commissioner*, 82 T.C. 766 (1984) (requiring a return to provide sufficient data to calculate tax liability and purport to be a return and requiring the taxpayer to make an honest and reasonable attempt, apparent from the return itself, to comply with the tax laws and sign the return under penalties of perjury). Nor is a “bad return” an honest and reasonable attempt to comply with federal tax laws. *Id.* at 765-766. See “Identity Theft Returns and Disclosures Under Section 6103,” June 8, 2008, PMTA 2009-024, available at <http://www.irs.gov/pub/iranoa/pmta2009-024.pdf>.

The “bad return” filed by an identity thief and the information reported thereon does, however, constitute “return information” under I.R.C. § 6103(b)(2)(A). Courts interpret the term “return information” broadly to include the taxpayer’s identity, and all other information received, acquired, or generated by the Service in connection with the determination of a taxpayer’s liability. See I.R.C. § 6103(b)(2)(A); *Payne v. United States*, 289 F.3d 377, 382 (5th Cir. 2002). The information listed on a “bad return” corresponds to the enumerated items contained in section 6103(b)(2)(A)’s definition of return information.

Whose Return Information is it?

In determining to whom an item of return information “belongs,” P&A ordinarily considers the identity of the person or entity with respect to whose liability the information was generated or received by the Service. *Martin v. IRS*, 857 F.2d 722, 724 (10th Cir. 1988). The determining factor is not whether return information merely affects more than one person’s liability, but whether the information in fact relates to the Service’s investigation or determination of another taxpayer’s liability. *Martin*, 857 F.2d at 724. In certain circumstances, however, material can constitute the return

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information of more than one taxpayer. *Solargistic Corp. v. United States*, 921 F.2d 729, 731 (7th Cir. 1991).

In PMTA 2009-024, P&A concluded that, upon its receipt and through the point in time when the fraudulent filing is confirmed, the “bad return” is the return information of the victim only. P&A also concluded that the “bad return” then also becomes the return information of the identity thief once the Service suspects and begins to investigate the possibility of fraud by the identity thief. Upon further reflection, P&A thinks the better analysis is that the “bad return,” upon its filing and receipt by the Service, is the return information of both the victim and the alleged identity thief.

First and foremost, though fraudulent, the “bad return” will often appear to be legitimate, leading the Service to process the “bad return” as the victim’s return and attribute the filing, and the line items included on the purported return, to the victim’s tax account. The date the return was filed, the document locator number assigned to it, the liability and payment amounts reported on the return, and the steps taken in processing the return (including any refund), will be posted to the victim’s account for the taxable year. Not only do all of the line items on that “bad return,” including the victim’s “taxpayer identity” information (e.g., name, address, and/or SSN), appear in the definition of return information, but the fact of its filing is also an item of return information. All of these items are collected by the Service, albeit as a result of fraud, with respect to the possible tax liability of the victim, making them the victim’s return information.³

At the same time, the alleged identity thief files the purported return knowing that he is perpetrating a fraud under the internal revenue laws and subjecting himself to the risk of prosecution (under, for example, section 7207). Thus, regardless of whether, or when, the Service detects the fraudulent filing, the “bad return” can also be considered the thief’s return information because it is “data” furnished to and received by the Service with respect to the “determination of the existence, or possible existence, of liability of [the identity thief] for an offense under the Code.” See, e.g., *O’Connor v. IRS*, 698 F. Supp. 204, 206 (D. Nev. 1988) (a threat against a Service employee is a violation of section 7212 and information collected with respect to that offense is return information), *aff’d without op.*, 935 F.2d 275 (9th Cir. 1991).

Because section 6103 does not incorporate any temporal limit on the designation or identification of returns and return information as being that of a particular taxpayer, the “bad return” remains the return information of the victim (as well as the thief) even if it is later determined that it was not filed by the victim and even if and when the victim’s

³ When the return (whether paper or e-filed) comes into the Service but is “caught” in the ID theft filters, its receipt is captured on the Tax Return Database (TRDB). Wage & Investment attempts by letter to contact the person whose name appears on the return at the address on the purported return. The letter informs the taxpayer that W&I has questions about the return and W&I will not process the return or refer it to CI until W&I hears back from the taxpayer or until after the passage of a limited period of time (20 days).

account is “restored” to its status prior to the fraudulent filing.⁴

When the Service’s Wage and Investment Division (W&I) is alerted to an irregularity and attempts to determine whether this “bad return” was actually filed by the victim, any information that W&I generates during any processing of the return, including what it gathers with respect to its determination that the victim did not file the “bad return,” would also constitute the victim’s return information (but would not constitute the identity thief’s return information). By contrast, the information developed by CI during any investigation it opens after receiving a referral from W&I would constitute the return information of the identity thief and not the victim. So, too, would any information CI receives from other members of the ITTF, such as copies of income tax returns, ledgers with lists of taxpayer names and other identifying information, green dot cards, and other evidence of refund fraud schemes that involve identity theft.

Of course, any of the return information W&I and CI creates or compiles during their respective processing and investigation of the “bad return” may be shared with each other based upon the assigned employee’s need for the return information in the performance of his tax administration responsibilities. I.R.C. § 6103(h)(1). But the internal sharing of one taxpayer’s return information doesn’t mean it becomes the return information of the other taxpayer. Rather, the Service would look to the “item” test of section 6103(h)(4)(B) to support the disclosure of third-party return information in an administrative or judicial proceeding pertaining to tax administration.⁵ For example, in a prosecution of the identity thief, the disclosure of any portions of the victim’s return information to establish that the victim did not know about, or authorize, the filing of the “bad return” would be permitted because his return information directly relates to the resolution of an element of the offense that is the basis of the prosecution of the identity thief. *United States v. Northern Trust Co.*, 210 F.Supp.2d 955, 957 (N.D. Ill. 2001) (“the third party’s tax return’s contents must be germane to an element of the claim....”).

Issue 1 - An identity theft victim may obtain from the Service a copy of the “bad return” and other return information associated with the processing of the “bad return” filed by the alleged identity thief.

The Service may disclose an individual’s return information to that individual so long as the disclosure would not impair federal tax administration. I.R.C. §§ 6103(e)(1)(A)(i), 6103(e)(7). Consistent with the analysis above, an identity theft victim may receive from the Service any return information generated or received by the Service related to the

⁴ Even if the Service were to confirm the “bad return” as fraudulent before it is processed and take no action with respect to the victim’s account, the submission of a purported return bearing the victim’s name and/or SSN, and the unsuccessful attempt to affect the victim’s tax account by means of a “bad return” in the victim’s name would nevertheless constitute the victim’s return information just as if it were processed.

⁵ Although neither defined in the statute or in regulations, we have interpreted an administrative proceeding to mean a proceeding conducted by an administrative agency, body, or commission charged under appropriate State or Federal law to make determinations regarding a taxpayer’s liability under the Code or related statutes, including, but not limited to, examination procedures, the Appeals process, the rulings and pre-filing processes regarding potential future liability, and collection matters.

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victim's possible liability, including a copy of the "bad return" (so long as the disclosure is not determined to impair federal tax administration).⁶ Return information received or generated with respect to CI's investigation of the suspected identity thief, however, cannot be disclosed to the victim unless another exception of section 6103 applies. The Code provides no authority for disclosure of an identity thief's return information to an identity theft victim. This would include the identity of the person who filed the "bad return." *Cf. Hodge v. IRS*, 2003 WL 22327940 (D.D.C. 2003) (the name and address of a person who mistakenly used plaintiff's social security number in claiming an exemption for her child on her tax return, was third party return information that could not be disclosed to the plaintiff).

Issue 2 - I.R.C. § 6103(i)(3)(A), which authorizes the disclosure of certain return information to federal agencies with jurisdiction to enforce federal non-tax crimes, allows the disclosure of the "bad return" to appropriate federal law enforcement agencies.

Section 6103(i)(3)(A) provides limited authority for the Service to make proactive disclosures of return information other than "taxpayer return information"⁷ that may constitute evidence of the commission of a federal non-tax crime⁸ to the extent necessary to apprise the head of the appropriate Federal agency charged with the responsibility of enforcing such law."⁸ I.R.C. § 6103(i)(3)(A)(i). The Service may make disclosures under section 6103(i)(3)(A) regardless of whether the Service has concurrent jurisdiction over the crime. While the statute does not require that the return information be conclusive, the return information should sufficiently identify the specific criminal act to which it relates.

With respect to the victim, the "bad return" is not "taxpayer return information" because it was not filed "by or on behalf of the taxpayer to whom such return information relates," a definition that implies authorization or consent from the taxpayer. In the typical identity theft case, the victim has not authorized or consented to the filing of the bad return.

Because the "bad return" is actually submitted by the identity thief, could this document

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⁷ "Taxpayer return information," is defined as return information "which is filed with, or furnished to, the Secretary by or on behalf of the taxpayer to whom such return information relates." I.R.C. § 6103(b)(3). The information disclosed can include the taxpayer's identity only if there is information other than taxpayer return information that may constitute evidence of a taxpayer's violation of a federal non-tax criminal law. I.R.C. § 6103(i)(3)(A)(ii). In the typical "bad return" case, however, the thief's identity, if discovered, will almost always come from other than taxpayer return information.

⁸ The recipients of this return information are not free to redisclose the information as they are, likewise, subject to the confidentiality provisions of I.R.C. ' 6103. See, I.R.C. ' § 6103(a), 6103(i)(3) and 7213.

nevertheless constitute the thief's "taxpayer return information?" As P&A concluded in PMTA 2009-024, although untested, P&A believes there is a reasonable argument that a "bad return" is not the taxpayer return information of the identity thief because furnishing information in the guise of a tax return is insufficient to render such person a "taxpayer" with respect to the information furnished. By defining "taxpayer return information" as return information furnished or filed by a "taxpayer" and not just a "person," Congress presumably meant to extend this particular protection to information provided to the Service specifically with the intent to comply with the tax laws as they relate to the person who provided the information. Thus, in the statute's legislative history, it is stated that information that a taxpayer is "compelled by our tax laws to disclose to the Internal Revenue Service was entitled to essentially the same degree of privacy as those private papers maintained in his home." S. Rep. No. 938, 94th Cong., 2d Sess. 328 (1976). Here, an identity thief is not compelled to file the "bad return" and does not furnish the "bad return" in order to comply with his obligations under the Code. The identity thief thus should not enjoy the same protection afforded to taxpayers under section 6103(i)(3)(A). Moreover, section 7701(a)(14) defines the term "taxpayer" to mean "any person subject to any internal revenue tax." With respect to the "bad return," the filer is not a "person subject to any internal revenue tax" and is therefore not a taxpayer. While the fictitious filing does subject the identity thief to liability under the criminal penalty provisions of the Code, he is not subject to any tax with respect to its filing. Accordingly, the Service may disclose the "bad return" to non-tax federal law enforcement officials pursuant to section 6103(i)(3)(A)(ii).⁹

Note, however, that Merriam-Webster defines "apprise" to mean "to give notice [of]." Because the statutory text uses the word "apprise," the scope of return information disclosed under section 6103(i)(3)(A) should be limited so as to only alert the federal non-tax criminal law enforcement agency about the possible existence of a non-tax crime. If the federal non-tax criminal law enforcement agency decides to investigate the matter, it can seek the disclosure of returns and any additional return information (including any taxpayer return information) pursuant to sections 6103(i)(1) and (2).

Finally, in making these disclosures, it is essential that the delegated official disclose the "bad return" only after he has made the factual determination, and assured himself, that the "bad return" is, in fact, fictitious. To disclose a return under these circumstances without making the necessary factual determination that it was, in fact, a fictitious "bad return" could result in an unauthorized disclosure and possible civil and criminal penalties under I.R.C. §§ 7431 and 7213, respectively. The procedures set forth in IRM 11.3.28.8 (August 1, 2005), Disclosures of Return Information (Other than Taxpayer Return Information) Concerning Nontax Criminal Violations, should be followed. Currently, the authority to disclose return information under section 6103(i)(3)(A) is delegated to the Director, Disclosure. IRM 1.2.49-2 (June 15, 2004), Delegation Order 11-2 Reference Chart; see *also* IRM 9.3.1.9.1.1(5) (September 25, 2006).

⁹ Taxpayer return information would include, however, interviews with, or other material submitted by, either the victim or the identity thief as part of the Service's attempt to determine the facts of the case.

Issue 3 - State and local law enforcement agents appointed (but not detailed) to the Department of Justice as part of title 26 and non-title 26 grand jury investigations may access return information under I.R.C. §§ 6103(h)(2) or (i)(1), (i)(2), and (i)(3)(A) respectively.

Upon a written request from the statutorily proscribed high level Department of Justice official or upon the Service's own referral, the Service may disclose to the Department of Justice, including U.S. attorneys, certain returns and return information for use in Federal grand jury proceedings in tax administration matters. I.R.C. §§ 6103(h)(2)-(3); Treas. Reg. § 301.6103(h)(2)-1(a)(2). The return and return information disclosed may be inspected by, and disclosed to Justice personnel (including U.S. Attorneys and their staff) "personally and directly engaged in, and for their necessary use in, any proceeding (or for their necessary use in an investigation which may result in such a proceeding) before a Federal grand jury or any Federal or State court" in any tax administration matter.¹⁰ Treas. Reg. § 301.6103(h)(2)-1(a). In addition, DOJ has the same type of investigative disclosure authority enjoyed by Service personnel under section 6103(k)(6); they may disclose returns and return information to other persons to the extent necessary in connection with a Federal grand jury proceeding, so long as the purpose or activity cannot otherwise properly be accomplished without making such disclosure. Treas. Reg. § 301.6103(h)(2)-1(b)(1). Procedure and Administration cautions, however, against relying on this "investigative disclosure" authority as a categorical justification for the sharing of return and return information with state and local law enforcement personnel assigned to a federal grand jury investigation. As with the Service's authority to make investigative disclosures under section 6103(k)(6), such disclosures should be made on a case-by-case basis, depending on the particular facts and circumstances. See Treas. Reg. §§ 301.6103(k)(6)-1(a)(1)(v); 301.6103(h)(2)-1(b)(i). The regulations also permit DOJ personnel to share tax information with officers and employees of another Federal agency working under their direction and control in the grand jury investigation. Treas. Reg. § 301.6103(h)(2)-1(b)(2)(ii). Viewed in context, P&A concludes that, generally, tax information may not be shared with state and local law enforcement personnel merely because they are assigned to these grand jury investigations.

As reflected in IRM 9.3.1.4.4, state and local law enforcement personnel may be considered Federal employees for 6103 purposes so long as they are formally appointed as Federal employees (rather than merely detailed), they are assisting in a Federal investigation, and are supervised by a Federal employee. The Intergovernmental Procedures Act (IPA) provides for the assignment of state or local government employees to a federal agency. "The supervision of the duties of such an employee may be governed by agreement between the Federal agency and the State or local government concerned." 5 U.S.C. § 3374(c). But these assignments may take one of two forms – details or appointments – and the form dictates whether state and local law enforcement personnel may have access to tax information. State or local

¹⁰ The regulations also permit the disclosure of tax information for DOJ personnel's use in joint tax/non-tax grand jury investigations and related proceedings, so long as the Tax Division has approved the tax portion of the proceeding. Treas. Reg. § 301.6103(h)(2)-1(a)(2)(ii).

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government employees who are "appointed" under sections 3371-3376 of the IPA, 5 U.S.C. §§ 3371-3376 are considered Federal employees for 6103 purposes. See 5 U.S.C. § 3374(a)(1). IPA "detailees" under 5 U.S.C. § 3374(a)(2) are not considered Federal employees for purposes of access to confidential information. The incoming request also asks about a state or local law enforcement agent's authority to access return and return information if he is "deputized." Procedure and Administration is unfamiliar with the deputation process but notes that IRM 9.3.1.4.4(4) provides that "state and local personnel deputized under 21 U.S.C. § 878 by the DEA or the U.S. Attorney's Office in a narcotics investigation may not have access to tax information because they are not considered Federal employees for purposes of the disclosure laws."

CT Caveat to Issue 3

Due to the principles relied upon by P&A and the caveats listed below related to the status of state and local law enforcement officers, Criminal Tax opines that the only viable method of allowing state and local task force officers to assist the ITTF is through the grand jury process where the Tax Division authorizes a tax grand jury. Upon such approval, state and locals may, on a case by case basis, be allowed access to Title 26 return and return information as assistants to the attorney for the government.

1. Investigative Disclosures by DOJ Tax Division, while permissible under I.R.C. § 6103(k)(6), should not be treated as a wholesale authorization to disclose returns and return information to state and locals working with the ITTF.
2. Although "appointees" under the Intergovernmental Personnel Act may have access to I.R.C. § 6103 return and return information, GLS has determined that the "appointment" of state and locals to the IRS for purposes of an IRS task force was an unworkable solution for various reasons related to employment rights conveyed by that particular status.
3. Title 26 disclosure rules do not permit the sharing of Title 26 information in a task force setting, which would include state and local law enforcement officers deputized by the United States Marshalls Service or detailed by the IRS under the IPA.

Issue 4 - Under I.R.C. § 6103(c), an identity theft victim may consent to the disclosure of the "bad return" filed by the alleged identity thief (and any other items of the victim's return information) to state and local law enforcement agencies in connection with their law enforcement investigations related to the identity theft.

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The above procedures will not authorize the disclosure of return information in every possible scenario; e.g., to state and local law enforcement officials that are not appointed to the DOJ, or where the state or local authorities are pursuing state or local criminal charges. In such cases, the Service may disclose return and return information to a person designated by the taxpayer in a request for or consent to disclosure unless the disclosure would seriously impair federal tax administration. I.R.C. § 6103(c). Generally, a taxpayer can request that the Service disclose his return information, including to state and local law enforcement personnel, by filing a Form 8821 or another general purpose consent document that conforms to the regulations under this section. Treas. Reg. § 301.6103(c)-1(b). Procedure and Administration is working to design a consent tailored for this specific purpose. The victim can consent, at any time, to the disclosure of the “bad return” filed with the victim’s name or taxpayer identification number, transcripts that reflect the victim’s true wages, interest income, etc, and any information gathered by W&I in its determination that the taxpayer is an identity theft victim. To the extent the Service relies upon consent as authority for any disclosure, that consent should be retained for at least the two-year statute of limitations period for unauthorized disclosure lawsuits. And, because the statute of limitations is triggered by the taxpayer’s discovery of the disclosure, rather than the disclosure itself, P&A generally recommends at least a three-year retention period.