



YOUR VOICE AT THE IRS



THE OFFICE OF THE TAXPAYER ADVOCATE OPERATES INDEPENDENTLY OF ANY OTHER IRS OFFICE AND REPORTS DIRECTLY TO CONGRESS THROUGH THE NATIONAL TAXPAYER ADVOCATE.

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MEMORANDUM FOR TAXPAYER ADVOCATE SERVICE EMPLOYEES

FROM: /s/ Nina E. Olson
National Taxpayer Advocate

SUBJECT: Interim Guidance on Advocating for Taxpayers
When a Return Preparer Appears to Have
Committed Fraud

The purpose of this memorandum is to provide guidance to Case Advocates on how to recognize instances of refund theft by tax return preparers and the steps to take to advocate for impacted taxpayers. This memorandum supplements [Interim Guidance on Recognizing and Assisting Victims of Refund Preparer Theft](#) signed by the National Taxpayer Advocate on March 14, 2011.

Background

There are tax return preparers who defraud taxpayers and the United States Treasury by inflating income, deductions, credits, or withholding without the taxpayer's knowledge, with the goal of increasing the overall amount of the taxpayer's refund. The preparer then diverts the refund (or portion thereof) into his or her account.

There are many variations on the scenarios involving a preparer who has committed fraud on the taxpayer's return. For example, some cases may involve the preparer filing the return on paper, where the alterations to the return occur after the taxpayer has approved the return. In other cases, however, the taxpayer has indicated approval of the return by signing Form 8879, *IRS e-file Signature Authorization*, and then the preparer alters the return before electronically filing it.

In some of the cases, the preparer may split the refund by using Form 8888, *Allocation of Refund (Including Savings Bond Purchases)*, so that the taxpayer gets the amount of refund that he or she is expecting, and the preparer asks the IRS to direct deposit the portion of the refund resulting from the inflated items into his own bank account. In other cases, the preparer may have the entire refund direct-deposited into his or her account, and then wire transfers the amount the taxpayer was expecting into the taxpayer's bank account. Therefore, in order to advocate effectively, you will need to review the facts in each case closely to determine the appropriate legal analysis. As discussed more fully below, in some cases, you may be able to advocate that the IRS treat the return filed by the preparer as invalid, and make adjustments to remove all entries attributable to the invalid return. The taxpayer will need to file a *new original return* (not an amended return) with the IRS. In other cases, however, even if you cannot prove that the return filed by the preparer is invalid, you should advocate that the IRS adjust the taxpayer's account(s) to reflect the correct information. Keep in mind that when asking for adjustments to be made, abatement of tax under [IRC section 6404](#) may not be appropriate in every case; abatement is only appropriate where a tax liability in excess of the taxpayer's true liability is assessed because of the preparer's actions. In contrast, if the preparer's actions resulted in a larger refund but no additional tax assessment, there is no tax to abate.

Advocating that the Return is Invalid

If a taxpayer can produce a copy of the return that the preparer provided for the taxpayer's approval, you may be able to advocate that the return filed by the tax return preparer is invalid. In order to be valid, a return must satisfy the well-known four-part test set forth in *Beard v. Commissioner*, 82 T.C. 766, 777 (1984), *aff'd per curiam*, 793 F.2d 139 (6th Cir. 1986). The *Beard* test is as follows: (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. For additional discussion of the *Beard* test, see PMTA 2011-13, [Horse's Tax Service \(May 12, 2003\)](#).

The requirement to sign a return under penalties of perjury derives from [IRC section 6065](#), which states that generally a return, declaration, statement, other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under penalties of perjury. A return that does not comply with IRC section 6065 fails the fourth prong of the *Beard* test. Signing the jurat included on Form 1040, *U.S. Individual Income Tax Return*, (or Form 8879, *IRS e-file Signature Authorization*, for an electronically filed return) satisfies the requirement that a return is executed under penalties of perjury.

However, in cases in which the taxpayer has reviewed a copy of the return and signed the jurat and the tax return preparer has subsequently altered the return, the taxpayer has not executed his return under penalties of perjury; what was submitted to the IRS is not the document signed and approved by the taxpayer for filing with the IRS. Thus, the return altered by the tax return preparer does not meet the *Beard* test and is therefore invalid.

You Can Advocate for the Taxpayer by Taking the Following Steps:

1. Secure
 - a. a copy of the return that the preparer provided for the taxpayer's approval or the return information from IDRS if the taxpayer does not have the preparer's return copy; and
 - b. the administrative file; and
 - c. a bank statement reflecting the amount of the refund the taxpayer received. If the taxpayer received a cash refund directly from the preparer; request a signed written statement that includes the amount of the cash refund received.

2. In addition, secure a written statement from the taxpayer, signed under penalties of perjury, which states:
 - a. the bank account to which the refund (or a portion of the refund) was deposited did not belong to the taxpayer;
 - b. the taxpayer had no knowledge that the preparer was depositing the refund (or portion thereof) into that bank account; and
 - c. the taxpayer had no knowledge that the preparer had filed a different return with the IRS.

3. Request the taxpayer complete Form 3911, *Taxpayer Statement Regarding Refund*, even if the taxpayer received a portion of the refund. Refer to [IRM 21.4.2.4](#), *Refund Trace Actions*.

4. If the taxpayer cannot produce a copy of the return but has other documents to support his or her assertion that what the preparer filed is not what the taxpayer approved, secure copies of those documents (e.g., copies of work papers the return preparer used in preparing the return or the taxpayer's copies of the Forms W-2, *Wage and Tax Statement*, showing the correct, unaltered wages and withholding). Provide a statement that this is the information the taxpayer provided, and if the return had been properly prepared, the refund the taxpayer received is approximately what should be expected if the return had been prepared based on correct information.

5. Ask the taxpayer to submit a signed copy of his or her true original return, Form 1040 series, to the proper filing location, and provide you with a copy. If the taxpayer does not have a copy of the filed return and is unable to reconstruct the return; assist the taxpayer by providing income statements retrieved from IDRS using Command Code (CC) [IRPTRO](#).
6. Monitor the taxpayer's IDRS account for the taxpayer's true return to post. When the second return posts to IDRS it will appear as Transaction Code (TC) 976 or TC 977 creating an -A freeze on the account.
7. Refer the case on TAMIS to a Campus Technical Advisor (CTA) for guidance, indicating this is a "Preparer Refund Fraud" case, and be sure to use special case code "PF."
8. Issue an Operations Assistance Request (OAR), for the IRS to adjust the taxpayer's account to reflect the correct information as shown on the correct original return. Provide copies of the appropriate Counsel opinion(s) as supporting documentation for the OAR. Suggested wording for the OAR could include:

I have reviewed the facts and law pertaining to this case, and it is TAS's position the IRS adjust the taxpayer's Master File account to reflect the correct information for tax year 20XX. I recommend that Accounts Management (AM) take the following actions:

- *Based on a Beard analysis, treat the 20XX tax return filed by the tax return preparer as invalid and adjust the account to remove all entries attributable to the altered/fraudulent return, including moving the refund.*
 - *If the IRS concludes that the tax return filed by the tax return preparer is valid, the IRS should nonetheless adjust the taxpayer's account for 20XX to reflect the correct information.*
9. If the Operating Division/function refuses to take actions to correct the account, or takes actions that do not relieve the taxpayer from adverse action or liability, elevate the case to the LTA for consideration of issuing a Taxpayer Assistance Order (TAO).

Advocating When You Cannot Prove the Return is Invalid

Even if you cannot prove the return filed by the tax return preparer is invalid under the *Beard* test, you nonetheless can advocate for relief for the taxpayer. Certain adjustments to the taxpayer's account are appropriate so that the taxpayer is not held liable for a refund (or portion thereof) fraudulently obtained by the preparer. The Office of Chief Counsel has advised that the portion of the refund that reflected the difference between the refund amount the taxpayer approved and the amount that the preparer included on the return filed with the

IRS should not be attributed to the taxpayer. While abatement may not be appropriate in every case (e.g., the tax return preparer's actions resulted in a larger refund but did not result in an additional tax assessment, so there is no tax to abate), the IRS must adjust the taxpayer's account for any refund (or portion thereof) illegally obtained by the preparer.

You Can Advocate for the Taxpayer by Taking the Following Steps:

1. Secure the administrative file, and a bank statement reflecting the amount of the refund the taxpayer received.
2. Secure a written statement from the taxpayer, signed under penalties of perjury, which states the:
 - a. Bank account to which the additional refund was deposited did not belong to the taxpayer; and
 - b. Taxpayer had no knowledge that the preparer was depositing the refund (or portion thereof) into that bank account.
3. Ask the taxpayer to submit an amended return, Form 1040X, *Amended U.S. Individual Income Tax Return*, to the proper filing location, and provide you with a copy.
4. Refer the case on TAMIS to a Campus Technical Advisor (CTA) for guidance, indicating this is a "Preparer Refund Fraud" case, and be sure to use special case code "PF."
5. Issue an OAR, asking the IRS to adjust the taxpayer's account to reflect the actual amount refunded to the taxpayer. If the preparer's actions resulted in an erroneous refund amount not received by the taxpayer, be sure to address in the OAR. Suggested wording for the OAR could include:

I have reviewed the facts and law pertaining to this case, and it is TAS's position the IRS adjust the taxpayer's Master File account to reflect the correct information for tax year 20XX. I recommend that Accounts Management (AM) take the following actions:

- *The taxpayer did not receive \$XXXX of the refund currently reflected on the account, as reflected on the bank statement (attached), and as explained in the signed statement (attached).*
- *Remove the erroneous refund amount from the taxpayer's account, so that the account reflects only the amount of refund received by the taxpayer.*

While the IRS does not currently have specific procedures for adjusting these accounts, the IRS does have procedures and statutory authority to institute Erroneous Refund Procedures, and/or assess certain penalties against return preparers.

Effect on Other Documents

This guidance will be incorporated into IRM 13.1.10, *Special Processes*.

Contact

If you have any questions, please contact Mara Christian, Chief, Policy Group, Technical Analysis and Guidance at (505) 837-5707.