

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

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subject: Revoking ITINS for CI Refund Scheme Cases

This memorandum responds to your request for assistance. This advice may not be used or cited as precedent.

**QUESTIONS**

1. Does current law allow the Internal Revenue Service (Service) to revoke ITINs that Criminal Investigation (CI) determines were fraudulently obtained?
2. Can the Service revoke ITINs for real people who filed fraudulent refund returns?
3. Can the Service refuse to consider these applicants for future ITINs?

**CONCLUSIONS**

1. Yes. Treas. Reg. § 301.6109-1(d)(3)(i) limits the issuance of an ITIN to an alien individual who does not have and is not eligible to obtain a social security number. This regulation allows the Service to revoke ITINs that CI determines were fraudulently obtained.
2. The Service may revoke ITINs for real people who filed fraudulent refund returns only if those individuals were not entitled to the ITIN. In contrast, the Service should not revoke a validly issued ITIN merely because the alien individual filed a fraudulent refund claim.

3. While the Service may revoke ITINs for people who obtained an ITIN fraudulently, the Service must consider these applicants for future ITINs and issue ITINS if the applicants meet the qualifications for an ITIN.

### FACTUAL BACKGROUND

All taxpayers are required to provide a taxpayer identification number on all returns, statements or other documents filed with the Internal Revenue Service (the Service). For individuals, the respective taxpayer identification number that must be used is that individual's social security number. In the event that an individual cannot obtain a social security number, that individual must obtain an ITIN.

The ITIN Policy Section is working with CI to get lists of ITINs in their cases where the defendant is convicted of ITIN fraud. The scenarios in which this occurs include:

- CI determines Forms W-7 were for applicants not legally entitled to an ITIN;
- CI determines ITINs were requested for dependents that the primary is not entitled to claim;
- CI determines a stolen ID was used for the application;
- CI determines a fraudulent ID was used for the application.

You seek our assistance on the whether the Service can revoke or refuse to consider applications in cases of ITIN fraud.

### DOES CURRENT LAW ALLOW THE INTERNAL REVENUE SERVICE (SERVICE) TO REVOKE ITINS THAT CRIMINAL INVESTIGATION (CI) DETERMINES WERE FRAUDULENTLY OBTAINED

Yes. The rules regarding the use of taxpayer identification numbers are in I.R.C. §6109 and its regulations. Under I.R.C. § 6109(a)(1), a taxpayer is required to include "such identifying number as may be prescribed" by the Secretary "for securing proper identification of such person" on all returns filed with the Service.

Treas. Reg. § 301.6109-1(d)(3) limits the issuance of an ITIN to an alien individual who does not have and is not eligible to obtain a social security number, and who is required to furnish a taxpayer identification number. This regulation allows the Service to revoke ITINs that CI determines were fraudulently obtained for individuals who are either not alien individuals that do not have and are not eligible to receive a social security number, or who are alien individuals not eligible for a social security number, but who are not required to have a taxpayer identification number.

These provisions in the regulations regarding the ITIN date back to 1995 and 1996 when Treasury published the proposed<sup>1</sup> and final regulations<sup>2</sup> creating the ITIN. The proposed regulations provide that "[t]he assignment of a unique and permanent number to each taxpayer is important for the effective operation of the IRS automatic data processing system. The numbering system improves the IRS' ability to identify and access database records; to match information provided on tax and information returns, statements, and other documents with the proper taxpayers; and to provide better customer service to taxpayers."<sup>3</sup> The preamble to the Final Regulations explains that the ITIN was specifically introduced "for use by alien individuals, whether resident or nonresident, who currently do not have, and are not eligible to obtain, social security numbers." It explains further that the ITIN was "designed to help taxpayers (who need a TIN but cannot qualify for a social security number) maintain compliance with TIN requirements under the Code and regulations."<sup>4</sup>

The Service therefore designed the ITIN system very narrowly and tailored it to alien individuals who need a TIN but who are ineligible for SSNs. This narrow design has been upheld by the Tax Court. In *Miller v. Commissioner*, 114 T.C. 511 (2000), a married couple petitioned to redetermine a deficiency determined by the Service after they claimed dependency exemptions on their joint Federal income tax return without furnishing SSNs for their children as required by I.R.C. § 151(e). Petitioners believed that SSNs were universal numerical identifiers equated with the "mark of the Beast" warned against in the Bible. Because their religious objection extended only to universal identifiers and not to numbers issued for a discrete purpose, they offered to obtain ITINs for their children and provide the ITINs on their return. The Service refused, relying on the regulations that permit issuance of ITINs only to those who are ineligible to receive SSNs.

The Tax Court upheld the deficiency based on the regulations.<sup>5</sup> It also rejected petitioners' challenge to the deficiency under the Establishment Clause of the First Amendment and the Religious Freedom Restoration Act of 1993, stating that the current regulatory scheme is the least restrictive means of achieving the Government's compelling interests in implementing the Federal tax system in a uniform, mandatory way **and in detecting fraud** in regard to dependency exemptions.<sup>6</sup>

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<sup>1</sup> 60 FR 30211-01, 1995-2 C.B. 485 (June 8, 1995).

<sup>2</sup> T.D. 8671, 61 FR 26788, 1996-1 C.B. 314 (May 29, 1996).

<sup>3</sup> 1995-2 C.B. at 486.

<sup>4</sup> 1996-1 C.B. at 315.

<sup>5</sup> 114 T.C. at 519.

<sup>6</sup> 114 T.C. at 518.

Therefore, although section 6109 does not prohibit the issuance of an ITIN (or other taxpayer identification number) to a person eligible for a social security number the Service is justified in providing only limited exceptions to the use of SSNs including no exception for persons eligible to receive an SSN. Accordingly, the Service may revoke ITINs that CI determines were fraudulently obtained by either an individual who is not an alien individual who does not have and is not eligible to receive a social security number, or by an alien individual who does not have and is not eligible to receive a social security number but who is not required to provide a TIN as part of a filing requirement.

### CAN THE SERVICE REVOKE ITINS FOR REAL PEOPLE WHO FILED FRAUDULENT REFUND RETURNS?

The Service may revoke ITINs for real people who filed fraudulent refund returns only if the individual was not entitled to the ITIN. The Service should not revoke a validly issued ITIN merely because the alien individual filed a fraudulent refund claim.

As discussed above, Treas. Reg. § 301.6109-1(d)(3)(i) limits the issuance of an ITIN to an alien individual who does not have and is not eligible to obtain a social security number and who is required to provide a TIN as a filing requirement. Although Treas. Reg. § 301.6109-1(d)(3)(i) states that an ITIN is to be used “in connection with filing requirements” of the Internal Revenue Code, the regulations do not otherwise limit the use of an ITIN. In our view, I.R.C. § 6109 is not broad enough to restrict the use of a validly issued taxpayer identification number once such number has been issued.<sup>7</sup> Instead, I.R.C. § 6109 only authorizes the Service to issue regulations that prescribe both the identifying number to be used by a taxpayer, and when such number should be provided on a return, statement, or other document that a taxpayer files with the Service.

The civil penalties for filing fraudulent refund returns are set forth in I.R.C. § 6664(a) which provides that “[i]f any part of any underpayment of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 75 percent of the underpayment that is attributable to fraud.” Criminal tax penalties may also be available to “prohibit and punish fraud occurring in the assessment and collection of taxes.”<sup>8</sup> The revocation of a validly issued ITIN, however, is not one of the panoply of penalties that are available in cases of return refund fraud.

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<sup>7</sup> We do note that in the event that an individual with an ITIN becomes a United States citizen, that individual is required to obtain a social security number and use the social security number on all subsequent filings with the Service. Treas. Reg. § 301.6109-1(d)(4)(i).

<sup>8</sup> *United States v. White*, 417 F.2d 89, 93 (2d Cir.1969), *cert. denied*, 397 U.S. 912; *reh. denied*, 397 U.S. 1030 (1970). The most frequently used criminal statutes for return refund fraud include:

1. The willful attempt in any manner to evade or defeat tax or the payments of such tax under I.R.C. § 7201;
2. The willful subscribing of a return or other statement containing a written declaration that it is made under penalties of perjury under I.R.C. § 7206(1);

CAN THE SERVICE REFUSE TO CONSIDER THESE APPLICANTS FOR FUTURE ITINS?

Although the Service may revoke ITINs for people who obtained the ITIN fraudulently, the Service must consider the individual's future ITIN application because the individual may have a filing requirement that requires the taxpayer to furnish a TIN in the future. I.R.C. §6109(a)(1) requires a taxpayer to include "such identifying number as may be prescribed" by the Secretary "for securing proper identification of such person" on all returns filed with the Service. Accordingly, the Service must issue an ITIN if the taxpayer later has a United States tax filing requirement to allow the taxpayer to comply with the Internal Revenue Code and regulations.

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3. The willful aiding and assisting in the preparation of a false return under I.R.C. § 7206(2).

Also available are the general federal criminal statutes described in U.S. Code Title 18. These include the aiding and abetting statute under 18 U.S.C. § 2, the conspiracy statute under 18 U.S.C. § 371, and the false statement statute under 18 U.S.C. § 1001.