

Office of Chief Counsel
Internal Revenue Service
memorandum

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to: Kenneth C. Corbin, Director
Return Integrity and Compliance Services
Wage & Investment Division

from: Ashton P. Trice 
Chief, Branch 2
(Procedure & Administration)

subject: Systematically Identified BMF Identity Theft

This memo is in response to a request for guidance that we received from Joanne Minsky, Division Counsel (Wage & Investment). We were asked to provide guidance directly to you. Specifically, we were asked to provide guidance on four issues:

1. Whether the Service can treat a filed Business Masterfile (BMF) return¹ as a nullity when the return is filed using a stolen employer identification number (EIN) without the permission or knowledge of the EIN's owner.
2. Whether the Service can treat a filed BMF return as a nullity when the EIN used on the return was obtained by identifying the responsible party with a stolen name and Social Security Number (SSN).
3. Whether the Service can update all related modules and MFTs when a determination of BMF identity theft is made through internal means.
4. Whether the Service may disclose information about a potentially fraudulent business or filing to the business that purportedly made the filing or to the individual who signed the return or is identified as the "responsible party" when the Service suspects the "responsible party" or business has no knowledge of the business or filing.

Conclusions

1. The Service may treat a filed BMF return as a nullity when a return is filed using a stolen EIN without the permission or knowledge of the EIN's owner because the return is not a valid return.
2. The Service may treat a filed BMF return as a nullity when the EIN used on the return was obtained by using a stolen name for Social Security Number for the business's responsible person. The return is not a valid return.

¹ BMF accounts include the following entity types: corporation, partnership, estate, trust, exempt organization, or government entity. I.R.M. § 25.23.9.1.

3. The Service may treat a return resulting from BMF identity theft as a nullity and may follow processing procedures consistent with that treatment. If advice on specific procedures is desired, Counsel can provide addition review.
4. The Service may disclose information about a potentially fraudulent business or filing to the business that purportedly filed the return or to the individual who purportedly signed the return or who is listed as the "responsible party" for purposes of determining if the filing was authorized.

Facts

As part of its program to combat identity theft, the Service has identified situations where identity thieves are filing fraudulent business returns either in support of fraudulent individual returns or as stand-alone returns in an attempt to obtain tax refunds fraudulently. To perpetrate the fraud, the identity thieves often use the identity information of a victim to file the fraudulent business returns. The Service has identified two common scenarios.

In the first scenario, the identity thief obtains the EIN of a legitimate business (the business victim). The legitimate business may be active or inactive. The identity thief uses the legitimate EIN to file fraudulent business returns, purportedly on behalf of the legitimate business. The business returns may either be an income tax return in an attempt to obtain a fraudulent refund, or employment tax or information returns (e.g., Forms 941 or W-2) used to support fraudulent individual income tax returns filed to generate fraudulent refunds.

In the second scenario, the identity thief uses the identity information of an individual (the individual victim) to obtain an EIN for a fictitious business by listing the individual victim as the responsible party on an EIN application. Instructions to the Form SS-4, "Application for Employer Identification Number," define "responsible party," in pertinent part, as follows:

For entities with shares or interests traded on a public exchange, or which are registered with the Securities and Exchange Commission, "responsible party" is (a) the principal officer, if the business is a corporation, (b) a general partner, if a partnership, (c) the owner of an entity that is disregarded as separate from its owner...or (d) a grantor, owner, or trustor, if a trust.

For all other entities, "responsible party" is the person who has a level of control over, or entitlement to, the funds or assets in the entity that, as a practical matter, enables the individual, directly or indirectly, to control, manage, or direct the entity and the disposition of its funds and assets. The ability to fund the entity or the entitlement to the property of the entity alone, however, without any corresponding authority to control, manage, or direct the entity (such as in the case of a minor child beneficiary), does not cause the individual to be a responsible party.

The identity thief then uses the EIN to claim either fraudulent refunds on business income tax returns or to file information or employment tax returns to support the filing of fraudulent individual income tax returns. The fraudulent returns will often purport to be signed by the individual victim.

In both scenarios, the Service suspects that the business filings (either the EIN application or the tax returns) are fraudulent. The Service wishes to contact the responsible party or business representative to determine whether the filings are authorized filings. To accomplish this, the Service would send a letter to the responsible party or business representative asking for additional information about the business. The letter would disclose the business's name, EIN, and tax period at issue.

Analysis

Issue 1 – Whether the Service can treat a filed BMF return as a nullity when a return is filed using a stolen EIN without the permission or knowledge of the EIN's owner.

The answer to this question hinges on whether a return is valid when it contains a stolen EIN without the permission or knowledge of the EIN's owner.

1. Requirement to File a Return

The tax return is the fundamental document at the center of our tax system, which relies on voluntary compliance and self-assessment. See *Commissioner v. Lane-Wells Co.*, 321 U.S. 219, 223 (1944). The requirement in the Code to file a tax return is set forth in section 6011(a), which simply provides that “[w]hen required by regulations...any person made liable for any tax imposed by this title,² or with respect to the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary.” The Code imposes an obligation to file tax returns on a variety of taxpayers, including certain individuals, corporations, estates, trusts, and exempt organizations. I.R.C. §§ 6012(a)(1)-(5), 6031, 6033.

A return must include 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. 1966). Taxpayers must include a taxpayer identifying number on each return. I.R.C. § 6109(a); Treas. Reg. § 301.6109-1(b)(1); see, e.g., 2014 Form 1120 Instructions, 2014 Form 1065 Instructions, 2014 Form 1041 Instructions. When a return is required to be filed by a person other than an individual (such as a corporation, partnership, or trust), the taxpayer must provide an EIN. Treas. Reg. § 301.6109-1(a)(1)(ii)(C). A return must be signed, and only the taxpayer or an authorized agent (in limited circumstances) may sign an income tax return. I.R.C. § 6061(a); Treas. Reg.

² In other words, a “taxpayer.” See I.R.C. § 7701(a)(14) (defining “taxpayer” as “any person subject to any internal revenue tax”).

§ 1.6061-1(a). When a return is required to be filed by a person other than an individual, the person required to sign the return varies by type of return.³

2. Valid Return

Neither the Code nor the Treasury regulations define “return” or “tax return.” The function of a tax return is to report the taxpayer’s tax liability as determined by the taxpayer, the total payments and credits, and the total amount of tax due or overpaid for the taxable period covered. Treas. Reg. § 1.6011-1(b) directs that “[e]ach taxpayer should carefully prepare his return and set forth fully and clearly the information required to be included therein.” The regulation warns, “Returns which have not been so prepared will not be accepted as meeting the requirements of the Code.” *Id.*

The seminal case on what is necessary for a filed document to be a tax return is *Beard v. Commissioner*, 82 T.C. 766 (1984), *aff’d* by 793 F. 2d 139 (6th Cir. 1986). The *Beard* test (also known as the “substantial compliance test”) has four parts: (1) whether the return provides sufficient data to calculate tax liability; (2) whether the document purports to be a return; (3) whether the taxpayer made an honest and reasonable attempt, apparent from the return itself, to comply with the tax laws; and (4) whether the taxpayer signed the return under penalties of perjury.⁴ A document that meets all four elements is said to be a “valid” return (although the *Beard* court did not use that word). If the document filed does not meet the requirements of a valid return, it is generally invalid for all tax purposes. *Southern Sportswear Co. v. Commissioner*, 10 T.C. 402, 405-06 (1984), *vacated and remanded on other grounds*, 175 F.2d 779 (6th Cir. 1948) (*per curiam*).

A purported return of tax that is invalid is a non-return, a “nullity.” *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 180 (1934). The fact that a tax return is fraudulent, however, does not alone render it a non-return. See *Badaracco v. Commissioner*, 464 U.S. 386, 396-98 (1984) (finding that returns which fraudulently understated income were valid returns and not nullities because the returns purported to be the taxpayers’ returns, were sworn to by the taxpayers, and facially appeared to be attempts to comply with the law). The section 6663 penalty for filing a fraudulent return cannot apply without a valid return being filed. I.R.C. § 6664(b). Even a fraudulent return calculates a tax liability, purports to be a return, facially appears to attempt to comply with the tax law, and is signed by the taxpayer under penalties of perjury.

On the other hand, a BMF return filed by an individual who used a stolen EIN is a nullity. Even without resort to the *Beard* test, these returns are purely shams—the purported

³ For example, a corporation’s return generally must be signed by the president, vice president, treasurer, assistant treasurer, chief accounting officer, or any other officer duly authorized to so act. I.R.C. § 6062; Treas. Reg. § 1.6062-1(a). A partnership’s return must be signed by a partner. I.R.C. § 6063; Treas. Reg. § 1.6063-1.

⁴ The *Beard* test is essentially a distillation of several Supreme Court opinions, notably *Florsheim Bros. Drygoods Co. v. United States*, 280 U.S. 453 (1930), *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934), and *Germantown Trust Co. v. Commissioner*, 309 U.S. 304 (1940).

return alleges to be the return of a business, but the return is not actually filed by the business, so the return cannot be valid. As for the *Beard* test, the returns do not satisfy the fourth element—the requirement that the returns be signed by the taxpayer under penalties of perjury—even if they satisfy the other three elements. The returns cannot satisfy the *Beard* test because there cannot be a valid signature when the EIN is stolen. As such, these BMF returns are not truly returns and can be treated as nullities.

Issue 2 – Whether the Service can treat a purported BMF return as a nullity when the EIN used on the return was obtained by using a stolen name and Social Security Number to identify the responsible party for the business.

For purposes of what constitutes a return, we do not see a meaningful difference between (1) a BMF return filed by an individual using a stolen EIN without the permission or knowledge of the EIN owner and (2) a BMF return filed by an individual using a stolen name and SSN to obtain an EIN. For these purposes, we do not believe it is significant whether the identity thieves file the BMF returns using stolen EINs or EINs obtained by using stolen names and SSNs because in both instances the returns are not being filed by an actual taxpayer. Thus, we do not view BMF returns filed under either of these circumstances as returns, but instead view them as nullities. Much like the returns discussed above, these returns are shams because an alleged business filing a purported return and identified by an EIN obtained on the basis of stolen information is not a true entity, so the return cannot be valid. Moreover, a BMF return filed using an EIN obtained by using stolen information would fail the *Beard* test because the return is not signed by the taxpayer in whose name the return is filed. Because the BMF return is not a valid return, it is appropriate to treat it as a nullity.

Issue 3 – Whether the Service can update all related modules and MFTs when a determination of BMF identity theft is made through internal means.

When a determination of BMF identity theft is made through internal means, the Service can treat the return as a nullity, as discussed above. As we understand it, in cases of established BMF identity theft, the Service plans to either reverse the associated returns as nullities or input a fabricated entity marker with the return to associate it with identity theft. We do not know specific details of the procedures that the Service is proposing to implement, but when a return is properly classified as resulting from BMF identity theft, it is appropriate to treat the return as a nullity and follow processing procedures consistent with that treatment. If the Service has specific questions regarding particular procedures that it would like to implement, we would be happy to provide additional guidance.

As a practical matter, we recommend that regardless of any new procedures put in place relating to BMF identity theft, the Service maintain a record of the identity theft, including the identity of all parties known to be involved, the amounts and nature of any associated transactions, and any other relevant data. It is prudent to retain a record of that information in the event that it is needed for future investigations, litigation, or other purposes.

Issue 4 – Whether the Service may disclose information about a potentially fraudulent business or filing to the business that purportedly made the filing or to the individual who signed the return or is listed as the “responsible party” where the Service suspects the “responsible party” or business has no knowledge of the business or filing.

1. The Information is the Return Information of the Business Victim and the Identity Thief but Not the Individual Victim

Returns and return information are confidential, and may not be disclosed except as authorized under the Code. I.R.C. § 6103(a). A “return” is defined as “any tax or information return . . . required by, or provided for or permitted under . . .” the Code. I.R.C. § 6103(b)(1). “Return information” is defined broadly to include “any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to a determination of the existence, or possible existence,” of a taxpayer’s liability under the Code. I.R.C. § 6103(b)(2)(A); *McQueen v. United States*, 264 F. Supp. 2d 506, 516 (S.D. Tex. 2003); *LaRouche v. Dep’t of Treasury*, 112 F. Supp. 2d 48, 54 (D.D.C. 2000).

In this case, although the identity thief files items that purport to be, and are intended by the identity thief to be treated as, returns (e.g., Forms 941 and 1120), they are invalid returns because they are not signed by the true taxpayer under penalties of perjury. *Beard*, 82 T.C. at 777. An invalid return is not “required by, or provided for or permitted under” the Code. Accordingly, an invalid return is not a “return” for purposes of section 6103(b)(1).⁵

Although the filings are not returns for purposes of section 6103(b)(1), the fraudulent tax returns, EIN applications, and the information on and associated with them is return information because they were gathered, collected, or generated by the Service as part of a determination of liability, or potential liability, under the Code (e.g., for the reported taxes in the case of the business victim or for penalties in the case of the identity thief). I.R.C. § 6103(b)(2)(A). Accordingly, as return information, it can only be disclosed as authorized by the Code. I.R.C. § 6103(a).

Under section 6103(e)(7), taxpayers may have access to their own return information, provided the disclosure of the return information would not seriously impair Federal tax administration. *Linsteadt v. IRS*, 729 F.2d 998, 1000 (5th Cir. 1984) (in upholding the withholding of a memorandum summarizing an interview of the taxpayer, the court noted that section 6103 “provides that the taxpayer himself or his delegate may have access to his own return and return information unless the Secretary determines the disclosure ‘would seriously impair Federal tax administration.’”). In determining to whom the return information belongs, the determination focuses on whose liability under

⁵ For additional information, please see earlier advice issued by our office. *Disclosure Issues Related to Identity Theft*, Jan. 18, 2012, PMTA 2012-05, available at http://www.irs.gov/pub/lanoa/pmta_2012-05.pdf; *Identity Theft Returns and Disclosures Under Section 6103*, June 8, 2008, PMTA 2009-024, available at <http://www.irs.gov/pub/lanoa/pmta2009-024.pdf>

the Code is at issue when the information is collected. See I.R.C. § 6103(b)(1)-(3) (defining returns, return information, and taxpayer return information in terms of being collected or created “with respect to” a taxpayer’s liability under the Code); *Martin v. IRS*, 857 F.2d 722, 724-25 (10th Cir. 1988).

In situations where the identity thief files a fraudulent return in the name of an otherwise legitimate business, the return information created and gathered as part of that fraudulent filing is the return information of the business victim. This is because at the time of the fraudulent filing, all of these items are collected by the Service with respect to the possible liability of the business victim (*i.e.*, for income or employment taxes). Because the fraudulent filings were received by the Service as being with respect to the business victim, the information remains the return information of the business victim even if the Service later determines that the fraudulent filings were not filed by the business victim and the business victim’s account is “restored” to its status prior to the fraudulent filing. Accordingly, the Service may contact the business victim and disclose information about the fraudulent filing to the business victim in an attempt to determine whether the filing is in fact fraudulent because the information disclosed is the return information of the business victim.

In situations where the identity thief uses an individual victim’s identity information to obtain an EIN and/or file fraudulent tax returns for a fictitious business (other than a sole proprietorship), the information would not be the return information of the individual victim. An individual does not have individual liability under the Code based on being listed as a “responsible party” on an EIN application or being the signatory of a tax return. In those cases, the individual is deemed to be acting as a representative of the business and, although the business may have liability, the individual does not have liability in their individual capacity. Therefore, at the time of the fraudulent filings, the information would be gathered by the Service with respect to the return of a fictitious business or be gathered, collected, or created with respect to a determination of the liability of a fictitious business (for income or employment taxes) but not of the individual victim in their personal capacity. Accordingly, as the information would not be gathered, collected, or created with respect to the return of the individual victim or with respect to a determination of the individual victim’s liability under the Code, it is not the individual victim’s return information. Therefore, the information may only be disclosed to the victim if otherwise authorized by Title 26.

2. The Disclosures Are Authorized by Section 6103(k)(6)

Even if the information is not the return information of the victim (business or individual), the Service may disclose the information under section 6103(k)(6) when the Service is attempting to gather information that is otherwise not reasonably available in connection with a tax investigation – *e.g.*, whether the filings are legitimate.

Section 6103(k)(6) authorizes Service employees to disclose return information “in connection with [their] official duties relating to any audit, collection activity, or civil or criminal tax investigation” to the extent the disclosure is necessary in obtaining

information that is not otherwise reasonably available or “with respect to the enforcement of any other provision of [Title 26].” I.R.C. § 6103(k)(6). Disclosures under section 6103(k)(6) may only be made in such situations and under such conditions as the Secretary prescribes by regulation. Treas. Reg. § 301.6103(k)(6)-1(a)(1) permits disclosures of return information in connection with a Service employee’s official duties related to, among other things, administrative, criminal, and civil investigations and enforcement activities, to the extent the disclosure is necessary to obtain information related to those official duties or “to accomplish properly any activity connected with such official duties.” This includes, but is not limited to, disclosures to establish or verify misconduct (or possible misconduct), establishing or verifying the liability (or possible liability) of any person under the Code, and verifying information concerned with making determinations about a taxpayer’s liability under the Code. Treas. Reg. § 301.6103(k)(6)-1(a)(1)(iii), (iv), (viii). Disclosure under section 6103(k)(6) is only authorized if the Service employee reasonably believes that, at the time of the disclosure, the information was not otherwise reasonably available or if the employee needs to make the disclosure to carry out the employee’s official duties. Treas. Reg. § 301.6103(k)(6)-1(a)(2).

When determining whether the disclosure of the information is necessary, the issue is whether the Service employee reasonably believes, based on the facts and circumstances at the time of the disclosure, that the disclosure is “appropriate and helpful” to “accomplish properly the activities connected with carrying out” the employee’s official duties. Treas. Reg. § 301.6103(k)(6)-1(c)(1). Disclosure to “accomplish properly an activity connected with official duties” is defined as “a disclosure of return information to carry out a function associated with official duties generally consistent with established practices and procedures.” *Id.* Treas. Reg. § 301.6103(k)(6)-1(c)(2). Likewise, when determining whether the information is not otherwise reasonably available, the issue is whether the Service employee reasonably believes, under the facts and circumstances, that at the time of disclosure the information cannot be obtained in a “sufficiently accurate or probative form, or in a timely manner, and without impairing the proper performance of [his] official duties” without making the disclosure. Treas. Reg. § 301.6103(k)(6)-1(c)(3).

In this case, the Service would be contacting the business and individual victims in order to ascertain whether the victim filed or authorized the suspect filings. The Service would only contact the business and individual victims when the Service has reason to believe, in a specific case, that the filing was done without the knowledge of the business or individual victim. Contacting the business that allegedly filed the suspect filings or the individual who is listed as the “responsible party” or who signed the suspect filing would be appropriate and helpful to determining whether or not the suspect filings were legitimate. Accordingly, the disclosures would be authorized by section 6103(k)(6), where the information is not otherwise regarded as the return information of the victim (business or individual).

If you have questions about the content of this memorandum, please contact Melissa Henkel at (202) 317-6844 with respect to the first three issues and Jennifer Black at (202) 317-6833 with respect to the fourth issue.