

memorandum

INCOME TAX AND ACCOUNTING

date: FEB 28 1996

to: National Director, Tax Forms and Publications Division T:FP

from: Assistant Chief Counsel (Income Tax & Accounting) CC:DOM:IT&A:4

subject: Applicability of Code section 6109
TR-45-165-96

This is in reply to your memorandum dated January 31, 1996, concerning whether an applicant for an Individual Taxpayer Identification Number (ITIN) may be required to include the Social Security Number (SSN) of a third party on Form W-7, Application for IRS Individual Taxpayer Identification Number.

ISSUE

Whether a foreign dependent or spouse who applies for a taxpayer identification number (TIN) so that a taxpayer may claim an exemption for him/her (under section 151 of the Internal Revenue Code), may be required under section 6109 of the Code to provide the SSN of the taxpayer on Form W-7?

CONCLUSION

A foreign dependent or spouse who applies for a TIN so that another taxpayer may claim an exemption for him/her, may be required under section 6109 to have the taxpayer provide the taxpayer's SSN, but the taxpayer has the choice of providing the SSN under separate cover as opposed to on Form W-7.

FACTS

In accordance with the authority provided in section 6109(d) of the Code, the Service has published proposed regulations that would create a new TIN, the ITIN, for foreign persons who cannot obtain a SSN. An applicant requests an ITIN on Form W-7. Form W-7 requires that an applicant list the reason why he or she is filing the form. Check box reasons are provided on the form for the following situations:

- (1) A nonresident who is (i) required to file an U.S. tax return, (ii) filing to claim a refund, or (iii) married and filing a joint return with an U.S. spouse.
- (2) An U.S. resident who is not eligible for a SSN.

- (3) A foreign dependent of an U.S. person who will be claimed on that person's return, and
- (4) A foreign husband or wife for whom an U.S. spouse will claim an exemption.

If none of these reasons are applicable, another reason must be specified.

An applicant must substantiate the Form W-7 information by submitting documents such a passport, driver's license, birth certificate, identity card, or U.S. visa.¹ A copy of an original document may be submitted, if it is certified by the issuing agency or the custodian of the original record.

The Office of Investigations (Tax Filing Fraud) CP:CI:ORF is concerned that invalid ITINs may be used to obtain refunds in several of the situations described above. That office has proposed that a foreign dependent (the third situation above) provide the SSN of the U.S. person on whose return he/she will be claimed. Similarly, it has been proposed that a foreign husband/wife (the fourth situation above) provide the SSN of the U.S. spouse on whose return he/she will be claimed.

LAW

Section 6109(a) (1) of the Code provides that any person required under authority of this title to make a return, statement, or other document shall include in such return, statement, or other document such TIN as may be prescribed for securing proper identification of such person.

Section 6109(a) (2) of the Code provides that any person with respect to whom a return, statement, or other document is required under authority of this title to be made by another person or whose identifying number is required to be shown on the return of another person shall furnish to such other person such TIN as may be prescribed for securing his proper identification.

Section 6109(c) of the Code provides that for purposes of ~~this section the Secretary is authorized to require such~~ information as may be necessary to assign a TIN.

Section 6109(d) of the Code provides that the SSN issued to an individual for purposes of section 205(c) (2) (A) of the Social

¹ These requirements are similar to the requirements for obtaining a SSN from the Social Security Administration.

Security Act shall, except as otherwise be specified under regulations of the Secretary, be used as the TIN.

Section 6109(e) of the Code provides that any taxpayer who claims an exemption under section 151 for any dependent on a return for any taxable year shall include on such return the identifying number (for purposes of title 26) of such dependent.

Section 301.6109-1(d)(3)(iii) of the proposed Procedure and Administration Regulations provides that the application form for an ITIN, together with any supplementary statement and documentation, must be prepared and filed in accordance with the ~~form, accompanying instructions, and relevant regulations~~ applicable thereto, and must set forth fully and clearly the requested data.

DISCUSSION

In the situations at issue, the foreign dependent or spouse applies for an ITIN simply to allow an other to obtain a benefit; i.e., a section 151 exemption. Congress has shown concern about the care with which identification for participation in federal benefit programs has been issued. ~~In the Social Security~~ Amendments of 1972, Pub. L. No. 92-603 Congress enacted provisions limiting the issuance of SSNs to citizens and to aliens who were lawfully admitted and authorized to work in the U.S. The legislative history of those provisions shows that Congress was concerned with the elimination of the opportunities for fraud by undocumented aliens who had been relatively readily able to obtain SSNs under the "lax systems" employed by the Social Security Administration in prior years, enabling large numbers of illegal aliens to work in the U.S. S. Rep. No. 92-1230, 92d Congr., 2d Sess., 160-161 (1972).

In the case of the ITIN, it reasonable to take precautions against fictitious applications that could be submitted to obtain benefits. The Office of Investigations (Tax Filing Fraud) has advised that in order to confirm the identity of an ITIN applicant, it will be useful to establish the identity of the taxpayer who will be benefiting from the applicant's enrollment in the ITIN system. Accordingly, under section 6109(c) of the Code and ~~section 301.6109-1(d)(3)(iii) of the proposed~~ regulations the taxpayer's TIN may be considered information that is necessary to assign an ITIN.²

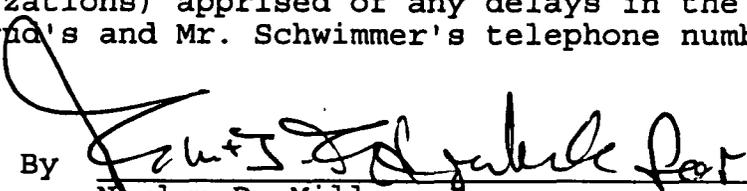
² The TIN may be an SSN or an ITIN; e.g., a nonresident alien who must file a tax return and who may claim a foreign dependent or spouse, would have an ITIN.

While the taxpayer's TIN may be necessary information for purposes of an ITIN application, it is also protected information under section 6109 and need only be provided to the Service or a third party as explicitly required therein.³ Technically, the foreign applicant has no authority to obtain the TIN of the taxpayer under section 6109. Contrast section 6109(a)(2) of the Code. Therefore, the Service cannot simply refuse to process Form W-7 if the taxpayer's TIN is missing.

In lieu of asking that the TIN be disclosed on Form 7, the Service has the authority to require the taxpayer to provide his/her TIN under a separate cover because the ITIN application is being filed only for the benefit of the taxpayer in the situations at issue. The foreign spouse or dependent is not required to file his/her own tax return. The taxpayer is, in effect, a co-applicant for the ITIN with the applicant. Under section 6109(a)(1) of the Code a person submitting a document to the Service must provide a TIN.

Accordingly, the Service has the authority to refuse to process a Form W-7 if the applicant does not have the taxpayer either provide his/her TIN on the application, or separately submit his/her TIN to the Service on a statement cross-referencing the application.

If you have any questions concerning this memorandum, please contact John Moran at 622-7072. Additionally, because an ITIN may be necessary to claim a \$500 per child credit under proposed family tax legislation, which may have a retroactive effective date, and because there may be implications for the earned income tax credit, please keep our office and Karin Loverud or Mark Schwimmer in the office of the Associate Chief Counsel (Employee Benefits & Exempt Organizations) apprised of any delays in the ITIN program. Ms. Loverud's and Mr. Schwimmer's telephone number is 622-6060.

By 

Norlyn D. Miller, Jr.

Senior Technician Reviewer, Branch 4

cc: CC:DOM:FS(PROC)
CC:EBEO
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CC:EL:DL
CC:INTL

³ As a practical matter, the question of whether there is a need to protect a TIN in the situations at issue should not arise. In the case of the foreign dependent, the taxpayer will often be filling out the application for the dependent. In the case of the foreign spouse, the taxpayer may have previously informed the spouse of the TIN in the course of filing nontax documents.