

Office of Chief Counsel
Internal Revenue Service
memorandum

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to: Nina E. Olson
(National Taxpayer Advocate)

from: Susan L. Hartford 
(Technical Advisor to the Special Counsel (National Taxpayer Advocate))

subject: Sections 6103, 7214, and 7803(c)(4)(A)(iv) and Identity Theft

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

Background

Section 7803(c)(4)(A)(iv) of the Internal Revenue Code provides that each Local Taxpayer Advocate (LTA), “**may, at the taxpayer advocate’s discretion, not disclose to the Internal Revenue Service contact with, or information provided by, such taxpayer.**” This discretion not to disclose, however, is not absolute. For example, a Taxpayer Advocate Service employee who has knowledge or information about a violation of the Internal Revenue laws must report such violation in writing to the National Taxpayer Advocate, who in turn would report the violation to the Commissioner. See IRC § 7214(a)(8); Treas. Reg. § 301.7214-1. The Taxpayer Advocate Service has developed procedures in IRM 13.1.5 for reporting a violation of the internal revenue laws to TIGTA, the IRS’s Criminal Investigation Division, or the Department of Justice.

IRM 13.1.5 also provides that a TAS employee does not have the discretion to conceal a felony. The failure to report a felony can be “misprision of a felony,” which is a federal crime under 18 U.S.C. § 4. A person is guilty of misprision of a felony if he or she has knowledge of the actual commission of a felony, conceals it, and does not make it known to a person in authority as soon as possible.

TAS often assists taxpayers who are undocumented workers, not eligible for a Social Security number (SSN). Those taxpayers have provided someone else’s SSN in order to obtain employment, but they have obtained an individual taxpayer identification number (ITIN) from the IRS in order to fulfill their filing/payment responsibilities. In the course of working with TAS to resolve a tax issue, an undocumented worker may make

statements to a TAS employee regarding the use of the SSN (e.g., the undocumented worker may indicate that he/she misappropriated the SSN solely to obtain employment).

Questions

- 1) Whether the use of someone else's SSN to obtain employment violates the internal revenue laws?
- 2) Whether the use of someone else's SSN to obtain employment is a felony?
- 3) If using someone else's SSN is a felony, whether a TAS employee has an obligation to report the felony, and if so, to whom?

Conclusions

- 1) A taxpayer who uses someone else's SSN to obtain employment but properly files and pays taxes on the wages earned has not violated the internal revenue laws.
- 2) Yes, using someone else's SSN to obtain employment may be prosecuted as a felony under various titles of the United States Code, but is not a felony under Title 26 (the Internal Revenue Code).
- 3) Nontax felonies should be reported to the agency that has jurisdiction over the particular activity. Section 6103 of the Code, however, generally prohibits TAS employees from reporting a nontax felony based upon information furnished by a taxpayer (or his representative) to any other federal agency.

Analysis

1) Treas. Reg. § 301.6109-1(a)(1)(ii)(B) provides that an individual who is not eligible to obtain an SSN must use an ITIN when filing returns and paying taxes. An employer, however, cannot use an ITIN on a Form W-2 but instead must use an SSN. See Treas. Reg. § 31.6051-1(a)(1)(i)(b). Thus, if the individual has used someone else's SSN to obtain employment, that SSN should be reflected on the Form W-2 the employer issues to that individual. So long as the individual uses his or her ITIN to properly report the wages that are reflected on the Form W-2 and pay the tax associated with that income, the individual has not violated the internal revenue laws. Consequently, the use of someone else's SSN is not reportable under section 7214 to TIGTA, the IRS's Criminal Investigation Division, or the Department of Justice.

In contrast, a taxpayer who uses someone else's SSN to obtain employment but then attempts to evade tax or willfully fails to file a return or pay tax may be guilty of a felony. See, e.g., IRC §§ 7201, 7203. Those types of situations should be reported under section 7214 to the Commissioner for appropriate action. See Treas. Reg.

§ 301.7214-1.

2) Knowingly and without lawful authority producing an identification document (e.g., social security card) or a false identification document is an offense punishable by fine, imprisonment, or both. 18 U.S.C. § 1028(a)(1). Similarly, 18 U.S.C. § 1028(a)(7) provides that the use, without lawful authority, of a means of identification of another person with the intent to commit an unlawful activity that constitutes a violation of Federal law is an offense punishable by fine, imprisonment, or both. In addition,

whoever...for the purpose of obtaining anything of value from any person... with intent to deceive, falsely represents a number to be the social security account number assigned by the Commissioner of Social Security to him or to another person, when in fact such number is not the social security number assigned by the Commissioner of Social Security to him or to such other person... shall be guilty of a felony.

42 U.S.C. § 408(a)(7)(B). In applying for employment, the undocumented worker may have presented either a false or stolen social security card as part of the Form I-9 process. If so, the individual would have violated 18 U.S.C. § 1028(a)(1). Even if the individual did not present the social security card to the employer, providing the SSN to the employer is a violation of 18 U.S.C. § 1028(a)(7). In addition, using someone else's SSN to obtain something of value from an employer (*i.e.*, wages) is a felony under 42 U.S.C. § 408(a)(7)(B). (There may be other provisions in Title 42 or various other titles of the United States Code for which using someone else's SSN constitutes a felony.)

3) Section 6103 allows for the disclosure of returns and return information to certain law enforcement personnel under limited circumstances. In particular, section 6103(i)(3)(A) provides limited authority for the IRS to make disclosures to alert another federal criminal law enforcement agency of a possible nontax crime. That section provides the general rule that "the Secretary may disclose in writing return information (other than taxpayer return information) which may constitute evidence of a violation of any Federal criminal law (not involving tax administration) to the extent necessary to apprise the head of the appropriate Federal agency charged with the responsibility of enforcing such law." IRC § 6103(i)(3)(A)(i). The information disclosed can include the taxpayer's identity, but only if there is other return information¹ (which is not taxpayer return information² within the meaning of section 6103(b)(3)) that may evidence the taxpayer's possible violation of a federal criminal law. IRC § 6103(i)(3)(A)(ii).

¹ "Return information" is defined very broadly in the Internal Revenue Code and includes the following: taxpayer's identity, the nature, source, or amount of the taxpayer's income, payments, receipts, deductions, exemptions, and credits, and any other data **given to or collected by the Secretary** with respect to a tax return or with respect to determining a taxpayer's tax liability. See IRC § 6103(b)(2) (emphasis added).

² "Taxpayer return information" is defined as return information within the meaning of section 6103(b)(2) which is **filed with, or furnished to, the Secretary by or on behalf**

In the cases where TAS is assisting an undocumented worker with a tax issue and the TAS employee has reason to believe the undocumented worker has stolen someone else's SSN, the identity of the undocumented worker and the information about this apparent fraud is, in general, "taxpayer return information" within the meaning of section 6103(b)(3). Consequently, TAS generally cannot rely on section 6103(i)(3)(A) to disclose the taxpayer's identity to any other federal agency (e.g., Immigration and Customs Enforcement) for nontax law enforcement purposes.

There could be situations, however, where the information about the fraud would not be viewed as "taxpayer return information" and disclosure to another federal agency would be permissible. For example, suppose a perpetrator files an individual income tax return using another person's name and SSN. The perpetrator is not trying to comply with his or her own filing/payment responsibilities, but rather, is filing the fictitious return solely to claim a fraudulent refund. A fictitious income tax return filed by an identity thief posing as his or her victim in order to obtain a fraudulent refund is not a valid return under the test set forth in Beard v. Comm'r, 82 T.C. 60 (1984). In addition, a fictitious income tax return filed in this context is not "taxpayer return information" within the meaning of section 6103(b)(3) because the perpetrator did not act in the role of a legitimate "taxpayer" when filing the return. In such a situation, section 6103(i)(3)(A) could be used as the basis to disclose the perpetrator's identity and information about the perpetrator's use of someone else's identity to federal law enforcement officials. No one in TAS, however, has the delegated authority to disclose the information to federal law enforcement officials. TAS employees would need to disclose the information to the Director of Disclosure or a Disclosure Officer, pursuant to Delegation Order 11-2. See IRM 1.2.49.2 and IRM Exhibit 1.2.49-2. In addition, because the fictitious return was filed to claim a fraudulent refund, the fraud should be reported to the IRS's Criminal Investigation Division. TAS employees can report the fraud through their manager to the NTA by following the confidentiality procedures in IRM 13.1.5.

The above advice will require some revisions to IRM 13.1.5, including the Case Advocate and Local Taxpayer Advocate questionnaires.

In providing this advice, we coordinated with CC:PA, and CC:CT, and they concur with the conclusions set forth above.

Please call (202) 622-7852 if you have any further questions.

Cc: Richard Morris (Director, Technical Analysis and Guidance)
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of the taxpayer to whom such return information relates. See IRC § 6103(b)(3) (emphasis added).