

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

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to: Division Counsel
(Small Business/Self-Employed)

from: Donald M. Squires
Senior Technician Reviewer
(Procedure & Administration)

subject: The Resolution of Identity Theft Cases Where the Service Issued a Statutory Notice of Deficiency

This Chief Counsel Advice responds to your request for assistance dated January 17, 2012. This advice may not be used or cited as precedent.

ISSUES

1. Whether a return filed by an identity thief, where the thief acquires and uses another taxpayer's name and social security number for purposes of obtaining a fraudulent refund, is a valid return.
2. Whether, upon the issuance of a statutory notice of deficiency that is based on the identity theft return, the Service may make necessary adjustments to an identity theft victim's account before the period to petition the Tax Court under I.R.C. § 6213(a) expires.
3. Whether the Service is required to rescind a statutory notice of deficiency that resulted from identity theft.

CONCLUSIONS

1. A return filed by an identity thief, where the thief acquires and uses another taxpayer's name and social security number for purposes of obtaining a fraudulent refund, is not a valid return.

2. Despite the issuance of a statutory notice of deficiency, the Service has the legal authority to make necessary adjustments to an identity theft victim's account before the period to petition the Tax Court under I.R.C. § 6213(a) expires.
3. Pursuant to Rev. Proc. 98-54, the Service may rescind a statutory notice of deficiency issued in the circumstances outlined in the factual scenarios and, while not required to do so, we recommend that the Service, with the concurrence of the victim, rescind statutory notices issued in identity theft cases.

FACTS

An identity thief files a federal income tax return using another taxpayer's name and social security number. The identity thief obtained the taxpayer's identifying information without the taxpayer's knowledge and filed the return without the permission of the true taxpayer in order to obtain a fraudulent refund. The address listed on the return does not belong to the true taxpayer. The perpetrator prepares a return with improper entries (e.g., the perpetrator attaches to the return one or more false W-2s showing phantom wages and withholding credits that exceed the taxes due on the reported income) thereby resulting in a fraudulent refund.

Though fraudulent, the "bad return" appears legitimate. Consequently, the Service processes the submitted return as the taxpayer-victim's return and enters the filing and line items included on the purported return on the victim's account. The Service mails a refund check to the identity thief at the address provided or electronically deposits the refund in a bank account designated on the return. If the Service subsequently determines a deficiency but does not realize that the return resulted from identity theft, the Service will issue a notice of deficiency with the victim's name and social security number. The Service will send the notice to the address on the identity thief's return, assuming that there has been no subsequent change to the taxpayer's last known address on the victim's account.

Under a second scenario, an identity thief files a federal income tax return using a taxpayer-victim's name and social security number but also uses the victim's actual address. The identity thief attaches a false W-2 or otherwise prepares a return with false entries. Again, the identity thief obtained the taxpayer's identifying information without the taxpayer's knowledge and filed the return without the permission of the true taxpayer. The Service processes the submitted return and direct deposits the refund in an account designated on the return. The Service then determines a deficiency but does not realize that an identity thief filed the return. The Service issues a statutory notice of deficiency showing the true taxpayer victim's name, address, and social security number.¹

¹ This advice does not address identity theft issues that arise when an individual (typically an undocumented worker) files a return using the individual's name but the social security number of another or using both the name and social security number of another taxpayer. In such cases, the items of

In both cases, after the issuance of the statutory notice of deficiency, the victim alerts the Service to an irregularity. The Service then determines that the submitted return was fraudulent and that the true taxpayer is a victim of identity theft.

LAW AND ANALYSIS

A return filed by an identity thief, where the thief fraudulently acquires and uses another taxpayer's name and social security number for purposes of obtaining a fraudulent refund, is not a valid return.

Our office has previously concluded that a return, filed by an identity thief, using the name and social security number of another individual in order to obtain a fraudulent refund is not a valid return with respect to the true taxpayer because it is not filed by the true taxpayer or with the taxpayer's consent. Moreover, such a return is not signed by the taxpayer in whose name the return is filed and, accordingly, lacks a valid signature. See *Beard v. Commissioner*, 82 T.C. 766 (1984) (requiring a return to provide sufficient data to calculate tax liability and purport to be a return and requiring the taxpayer to make an honest and reasonable attempt, apparent from the return itself, to comply with the tax laws and sign the return under penalties of perjury). Upon the determination that the submitted return resulted from identity theft, the Service will correct the victim's account and reverse the erroneous transactions. The Service will also mark the victim's account with an electronic identity theft indicator. The Service's Identity Protection Specialized Unit will then monitor the taxpayer's account and may provide status updates to a taxpayer affected by identity theft. See IRM 21.9.2 (August 26, 2011), Accounts Management Identity Theft; 10.5.3.2.2 (December 10, 2010), The Identity Theft Protection Specialized Unit (IPSU) and Referrals to other Functions.

The issuance of a statutory notice of deficiency in identity theft cases does not preclude the Service from making necessary adjustments to a taxpayer's account, and the Service should, with the concurrence of the victim, rescind a statutory notice of deficiency that resulted from identity theft.

The validity of a statutory notice of deficiency that the Service issues after the examination of a return fraudulently submitted by an identity thief raises many issues and concerns, but those issues do not affect our conclusions regarding the questions raised. Accordingly, these issues need not be resolved in this memorandum.²

income, withholding, credits, and deductions listed on the return are in fact the filer's attempt to comply with the requirements of the Internal Revenue Code.

² These issues include complications arising from the Service's possible change of the real taxpayer's last known address as a result of the address listed on a "bad return." By updating the taxpayer's account with the bad address, there is a possibility that the real taxpayer will not receive the statutory notice of deficiency and will not be aware of the time period in which to file a Tax Court petition.

The Service has the legal authority to make necessary adjustments to an identity theft victim's account prior to the expiration of the period under section 6213(a) for the victim to petition the Tax Court. Such adjustments include abating any assessments on the victim's account that were based on the "bad return." The only exception would be if a necessary adjustment involves making an additional assessment on the victim's account. In that case, the Service might be restricted from making an immediate adjustment. Even if an assessment is necessary, it is extremely unlikely to be one that was determined in the statutory notice issued with respect to the "bad return." A taxpayer may, however, by a signed notice in writing, waive section 6213(a)'s restriction on assessment at any time. Accordingly, if the necessary adjustments include an assessment, then the victim could waive section 6213(a)'s restriction on assessment in order for the Service to adjust the account immediately.

Prior to the expiration of the 90-day period (or 150-day period) to petition the Tax Court, the Service may with the consent of the taxpayer, rescind a notice of deficiency based on identity theft in the circumstances outlined in the scenarios.

The Service may rescind a notice of deficiency with the taxpayer's consent, if:

- the issuance of the notice was an administrative error;
- the taxpayer submits information that establishes that the deficiency is less than the amount in the notice; or
- the taxpayer requests an Appeals conference for the purpose of settlement negotiations and Appeals has determined that the case is susceptible to settlement.

I.R.C. § 6212(d); Rev. Proc. 98-54, 1998-2 C.B. 531.

The Internal Revenue Manual gives further examples in which the Service may also agree to rescind a notice of deficiency:

- a notice of deficiency has been issued for an incorrect amount,
- the notice was issued to the wrong taxpayer,
- the notice was issued for the wrong tax period, [or]
- the notice was issued without considering a properly filed Form 872, or Form 872-A in which the taxpayer consents to extend the assessment statute.

IRM 4.8.9.28.1 (June 14, 2011), Criteria for Rescinding.

If an identity theft victim submits information that establishes that he did not submit the "bad return" and that the information included with the "bad return" does not relate to his tax liability, issuance of the notice was an administrative error. In the outlined circumstances, while the Service is not required to rescind the notice, it has the authority to rescind it and with the consent of the victim, should do so.

Rescinding statutory notices of deficiency assures victims that they do not need to file petitions in the Tax Court in order to protect themselves from erroneous assessments based on defaulted notices. Rescission would also preserve the Service's ability to

issue a statutory notice to the victim if it later determines that there is a deficiency on the victim's own return.



Please call (202) 622-7950 if you have any further questions.