Office of Chief Counsel
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memorandum

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subject: Identity Theft Returns and Disclosures Under Section 6103

FACTS

Two typical identity theft scenarios confront the Service. The first is refund fraud, in which the perpetrator who has stolen someone else's identity files early in the filing season an individual income tax return in the name and with the SSN of the victim, who has not yet filed a return for the tax year. The perpetrator will often attach to the return one or more false Forms W-2 showing phantom wages and withholding credits exceeding the wages, thereby providing the basis for the purported refund. The perpetrator will also usually request on the return that the refund be directly deposited into a bank account under the perpetrator's control. When the identity theft victim later files a legitimate return for the tax year, the Service will likely flag it because of the significant discrepancies with the prior filed return and pending resolution freeze any refund claimed on the second return.[1] Eventually the identity theft and the fraud will become apparent.

In the second scenario, an undocumented worker, who does not have the legal status to work in the United States, uses another person's stolen SSN to appear work eligible. The undocumented worker provides the SSN to the worker's employer, and the employer in turn files a Form W-2 reporting the worker's wages and tax withholding under the SSN provided. In processing the W-2, the Service may attribute the wages to the identity theft victim and assert additional tax due.

[1] Ordinarily, if a taxpayer files a second return on or before the due date, the return is a superseding return, and the last timely filed return is the taxpayer's return for the taxable period. If a taxpayer files a second return after the due date, it is an amended return.

ISSUES AND ANALYSIS

1. *Whether the return filed in either of the above scenarios is truly a return for tax purposes generally.*

   a. Requirement to File a Return

The Code requires returns in many different situations, but they can be grouped as either tax returns or information returns. 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 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."[3] Under section 6012(a)(1), an individual must file an income tax return if for the tax year the individual had gross income equal to or more than the sum of an applicable "exemption amount" plus the basic standard deduction. As to identification of the taxpayer on a return, section 6011(b) authorizes the Secretary to require information about taxpayers "as is necessary or helpful in securing proper identification of such persons."

Sections 6031 through 6060 set forth the filing requirements for information returns. The principal information return filed by employers is Form W-2. An employer must file Form W-2 reporting wages paid during the calendar year to an employee if: (1) income, social security, or Medicare tax was withheld; (2) income tax would have been withheld if the employee had claimed no more than one withholding allowance or had not claimed an exemption from withholding; (3) the employer is in a trade or business and pays for the employee's services; or (4) the total compensation is at least $600. I.R.C. § 6051(a); Treas. Reg. §§ 1.6041-2(a)(1), 31.6051-1(a)(1); 2008 Instructions for Forms W-2 and W-3.[4] Forms W-2 must contain the employer's and employee's identifying information (name, address, and taxpayer identification number (TIN)) and information on wages and withholding. I.R.C. § 6051(a); Treas. Reg. § 31.6051-1(a)(1).

A required 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. 1996). Taxpayers must include a TIN on their returns. I.R.C. § 6109(a); Treas. Reg. §§ 31.6109-1(a); Treas. Reg. 301.6109-1(b)(1); 2008 Form 1040 Instructions. For individuals that is their SSN. Treas. Reg. § 301.6109-1(a)(1)(ii)(A). In addition, a taxpayer must provide the taxpayer's SSN to a person required to file a return with respect to the taxpayer, *e.g.*, to the taxpayer's employer for Form W-2, and the employer must request the number from the taxpayer and include it on the form. I.R.C. § 6109(a)(2)-(3); Treas. Reg. §§ 31.6011(b)-2(b)(1)(i)-(ii), 301.6109-1(b)(1), (c).

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

[3] There is also the more general obligation in section 6001 on any person liable for a title 26 tax to "keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary may from time to time prescribe."

[4] Except for those forms filed to comply with Treas. Reg. § 1.6041-2(a)(1) (which are filed with the Service), Forms W-2 (Copy A) are filed with the Social Security Administration, which forwards the information to the Service. Treas. Reg. § 31.6051-2(a).

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. § 1.6061-1(a).

b. Definition of Return

Neither the Code nor regulations define a return, tax return, or information return in general, though, as discussed below, section 6103 defines a "return" for purposes of that section only.[5] The function of a tax return, of course, is to report the taxpayer's tax liability as determined by the taxpayer, the total payments and credits, and the amount of tax due or overpaid for the taxable period covered. Information returns, including Forms W-2, have multiple purposes. One is to obtain information from third-party payors to facilitate determining whether the payee has reported all income and to arrive at the taxpayer's correct liability. A second purpose is to assist taxpayers in accurately reporting their income, withholding, and liability. A third purpose, with respect to the Form W-2, is to inform SSA of wages and other information relating to FICA taxes.

Whether and to what extent a filed return fulfills its purpose(s) depends chiefly on the filer. The Service prescribes the forms for returns and the items of information to be included therein. To assist taxpayers in completing and filing the forms, the Service provides instructions, detailed publications by tax topic, TeleTax, the live helpline, and so forth. Taxpayers, however, ultimately control what goes on their returns and what is omitted. 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."

Because numerous statutory provisions and administrative actions are keyed to or triggered by the filing of a tax return—including refunds, credit elections, substitutes for returns, assessment, interest, and penalties—it was natural that the basic issue would arise (and be subject to dispute and litigation) of what qualifies as a tax return, or, put another way, whether a filed document is a return for one or more of these purposes. Simply filing a document with the Service, even one purporting to be the person's return, does not make it an actual return of tax. As one source has noted:

> In the overwhelming bulk of cases, taxpayers use the prescribed form and provide the required information, leaving no doubt that they have filed a return, even if it is inaccurate or fraudulent. Occasionally, however, a document's status as a return is ambiguous because, for example, the taxpayer uses the wrong form, alters the form, omits crucial data, fails to sign, or describes the document as tentative or as an estimate.

B. Bittker & L. Lokken, *Federal Taxation of Income, Estates and Gifts* § 11.1.8 (2008).

c. Valid Return

The seminal case on what is necessary for a filed document to be a tax return is *Beard v. Commissioner*, 82 T.C. 60 (1984). The commonly referred to *Beard* test (also known as "substantial compliance") has four parts: (1) whether the return provides sufficient data to

[5] There are other limited-purpose definitions, as well. For example, section 6696(e)(1) defines a "return" for purposes of the return preparer penalties, and section 6724(d)(1) and Treas. Reg. § 301.6721-1(g)(1)-(4) define an "information return" for penalty purposes.

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.[6] A document that meets all four elements is said to be a "valid" return (though 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 (1948), *vacated and remanded on other grounds*, 175 F.2d 779 (6th Cir. 1948) (per curium).[7]

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). A taxpayer cannot amend or perfect an invalid return. Similarly, what the Service does with the return, including accepting it, does not cure its invalidity.[8] *Olpin v. Commissioner*, 270 F.3d 1297, 1301 (10th Cir. 2001); *Deese v. Commissioner*, T.C. Memo. 1958-89. By the same token, a defective or incomplete return can still be a valid return. *See*, *e.g.*, *United States v. Grabinski*, 727 F.2d 681, 686-87 (8th Cir. 1984) (income tax return omitting taxpayer's SSN and names of dependent children would be valid); *United States v. Long*, 618 F.2d 74 (9th Cir. 1980) (return with zeros entered for income, tax, exemptions, and withholding held valid for section 7203 purposes).[9]

Even the fact that a tax return is fraudulent does not alone render it a non-return. *Badaracco v. Commissioner*, 464 U.S. 386 (1984). In *Badaracco*, the taxpayers filed individual income tax and partnership returns that fraudulently understated their income. After they came under criminal investigation, the taxpayers filed amended, non-fraudulent returns. More than three years later, the Service issued notices of deficiency asserting the fraud penalty. The taxpayers claimed that the notices were barred by the limitations period on assessment, which taxpayers

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[6] The test is really a distillation of several earlier 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).

[7] An income tax return can, apart from its function as a self-reported statement of the taxpayer's tax liability for the year, also be a claim for refund to the extent it reports an overpayment of tax and requests a refund of the overpayment. Indeed, the proper form for claiming an income tax refund is an income tax return. Treas. Reg. § 301.6402-3(a)(1)-(5). The elements of a valid refund claim are distinct from but largely overlap the *Beard* test. A formal claim for refund "must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof." Treas. Reg. § 301.6402-2(b)(1). The stated "grounds and facts must be verified by a written declaration that is made under the penalties of perjury." *Id*. Even an informal claim for refund must state the factual and legal grounds for the refund to be valid,. *New England Elec. Sys. v. United States*, 32 Fed. Cl. 636, 641 (1995). An invalid return is generally also an invalid refund claim. *See Porcaro v. United States*, 99-2 U.S.T.C. ¶ 50,991(E.D. Mich. 1999) ("zero" return was not a proper refund claim); *Letscher v. United States*, 2000-2 U.S.T.C. ¶ 50,723 (S.D.N.Y. 2000) (a return with an altered jurat that referenced a frivolous attachment to the return was invalid for refund purposes).

[8] There is a difference between a return's validity and its processibility. For our advice, the salient question is what is the operative effect under the Code, particularly section 6103, of the document filed, irrespective of processibility.

[9] We do not agree with the *Long* case and do not follow the holding for purposes of determining whether a return is valid. In fact, there is a split of authority on the issue of whether a "zero" return is a valid return. *See*, *e.g.*, *United States v. Mosel*, 738 F.2d 157 (6th Cir. 1984) (per curium) (rejecting *Long*); *United States v. Rickman*, 638 F.2d 182, 184 (10th Cir. 1980) (finding that returns were invalid and "respectfully disgree[ing] with" *Long* to the extent it is authority to the contrary).

alleged started when the amended returns were filed. The Court held, however, that the original returns, not the amended ones, determined whether the time for assessment was limited, as well as whether criminal or civil fraud penalties apply. 464 U.S. at 391-96. Because the original returns were fraudulent, assessment could be made at any time. The Court found that the fraudulent returns were valid tax returns, and not nullities as the taxpayers argued. *Id*. at 396-397. The returns purported to be the taxpayers' tax returns, were sworn to by them, and facially appeared to be attempts to comply with the law.

Unlike the returns in *Badarraco*, income tax returns filed by identity thieves posing as their victims to obtain fraudulent tax refunds are in fact nullities. They are not valid returns. Even without resort to the *Beard* test, these returns are purely shams—they are not filed by the true taxpayer or with the taxpayer's consent, so they cannot possibly be considered returns of the taxpayer. As for the *Beard* test, the returns do not satisfy the fourth element, even if they satisfy the other three.[10] The returns do not have valid signatures, as they are not signed by the taxpayers in whose names the returns are filed.

As to information returns, there are no established criteria for validity comparable to the *Beard* test. There are penalties for filing information returns with missing or incorrect information. I.R.C. § 6721(a). In that respect, a deficient or erroneous information return is not accepted as satisfying the payor's filing requirement, but the deficient or incorrect return would not seem to be a non-return in the way that an invalid income tax return is. Certainly, a filed Form W-2 reporting all of the necessary information relating to an employee but containing a stolen SSN provided by the employee is not a sham return like the fictitious refund return of an identity thief. After all, the employer paid wages to the employee named on the form and withheld employment and income taxes from the wages. The form reflects a real employment relationship (with associated wage payments and tax withholding) and is filed as a good faith, intended information return. Unlike a tax return from an identity thief reporting a phony set of facts, the Form W-2 is not a fiction. Although the employer may be subject to a penalty (if the employer did not have reasonable cause for including the wrong SSN), the Form W-2 cannot be characterized as invalid.[11]

2. *Whether tax or information returns that are fictitious or contain false information as a result of identity theft are "returns" or "return information" under section 6103.*

   a. "Return" as defined in section 6103(b)(1)

Section 6103(a) provides that "returns" and "return information" are confidential and shall not be disclosed except as authorized in the section or elsewhere in title 26. As indicated, section 6103 defines the word "return," limited to the section, as "any tax or information return, declaration of estimated tax, or claim for refund *required by, or provided for or permitted under*,

[10] The perpetrator can be expected to try to make the document appear to be in all respects a bona fide return that includes enough information to obtain the fraudulent refund. The document therefore purports to be a return, contains sufficient (albeit false) information to calculate liability, and on its face appears to be an honest and reasonable attempt to comply with the internal revenue laws.

[11] Contrast this with the situation of a Form W-2 that an identity thief fabricates and attaches to a fraudulent Form 1040 to pass as documentation of the phantom wages and withholding credits reported on the return as the basis for the refund claimed. The bogus Form W-2 is not simply one with a defective SSN but otherwise containing the correct mandatory information and filed to comply with an employer's filing obligations. Rather, the whole form is defective and is only filed as part of an income tax return that is an invalid, non-return in its entirety.

the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person," including amendments, supplements, schedules, or attachments to the return. I.R.C. § 6103(b)(1) (emphasis added).

Whether a return is valid (and not a nullity) seems roughly equivalent to whether it constitutes a return within the meaning of section 6103. The Code does not require, provide for, or permit, the filing of an invalid return. In the case of a fictitious income tax return filed by an identity thief pretending to be the victim and claiming a refund of a fabricated overpayment, the filed Form 1040 (and any Form W-2 filed therewith) is not "required by," "provided for," or "permitted under" the Code. Hence, the document is not a "return" covered by section 6103. In contrast, a Form W-2 with the SSN of someone other than the worker, but which reports the worker's wages and taxes withheld, is a section 6103 return. The Form W-2, notwithstanding that the number identifying the worker does not belong to him, is a return required and called for by the Code.

b. "Return Information" as defined in section 6103(b)(2)

Irrespective of whether they are "returns," the information reported on the Forms 1040 and W-2, as filed in both situations, constitutes "return information" under section 6103(b)(2)(A). "Return information" is defined, in pertinent part, as:

> a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or 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 the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense.

I.R.C. § 6103(b)(2)(A). Return information is broadly interpreted to include any information that reaches the Service with regard to a person's liability for any tax, penalty, fine, or offense under the Code. *See LaRouche v. United States Dep't of Treasury*, 112 F. Supp.2d 48, 54 (D.D.C. 2000). A "taxpayer's identity" is the taxpayer's name, address, and TIN. I.R.C. § 6103(b)(6).

i. Refund Fraud

A fictitious return based on a stolen identity is arguably the return information of both the identity theft victim and the thief. Information obtained concerning one taxpayer can also in certain circumstances be the return information of another taxpayer with a separate liability. *Solargistic Corp. v. United States*, 921 F.2d 729 (7th Cir. 1991). The controlling factor is not whether return information affects more than one person's liability, but whether the information relates to the Service's investigation or determination of another taxpayer's liability. *Martin v. IRS*, 857 F.2d 722 (10th Cir. 1988).

The line items completed on the fictitious return correspond to the enumerated items contained in section 6103(b)(2)(A)'s definition of return information. Moreover, the fictitious return consists of "data" that is "received by" the Service with respect to determining the income tax liability of the taxpayer in whose name the return was filed. At least until the Service establishes that the return was filed by an identity thief, the fictitious return will initially be processed as the victim's

return. The date the return was filed, the document locator number assigned to it, the liability and payment amounts reported on the return, and the steps taken in processing the return (including any refund), will be posted to the taxpayer's account for the taxable year. If the Service determines that the refund was erroneous without discovering the identity theft, the Service will communicate with the taxpayer to recover the refund. Alternatively, when the taxpayer files a legitimate return, the discrepancies between the two returns will be evident, causing the Service to freeze any refund claimed and to communicate with the taxpayer to resolve the issues. Once the Service eventually learns of and confirms the identity theft, the erroneous information posted from the fictitious return should be corrected in the victim's account.[12] Until that point, all of the preceding information stemming from the fictitious return, and any other data or documents about the *victim's* reported or correct liability for the year, is the victim's return information.

The return information on the fictitious return is the return information of the identity thief once the Service suspects and begins to investigate the possibility of fraud by the actual filer of the return. At such time, it constitutes data that the Service compiles as a part of its determination as to the identity thief's possible liability for a criminal tax offense (in fact, it is the principal evidentiary fact). Even information concerning potential non-tax title 26 infractions is "return information" of the person(s) being investigated. *See, e.g., O'Connor v. IRS*, 698 F. Supp. 204, 206 (D. Nev. 1988) (a threat against a Service employee is a violation of section 7212 and information collected with respect to that offense is return information), *aff'd without op.*, 935 F.2d 275 (9th Cir. 1991); *Conn v. United States*, 92-1 U.S.T.C. ¶ 50,123 (N.D. Cal. 1991) (investigation report prepared by the former Inspection Service concerning conduct of a Service employee accused of making an unauthorized disclosure is return information of the accused employee). Section 7207 makes it a crime punishable by a fine up to $10,000 and imprisonment up to one year to willfully file a return or other document known to be fraudulent or materially false.

The filing of a fictitious Form 1040 that exploits a stolen identity will most often be the start of a whole series of events, communications, and case developments stretching over many months or years, with return information amassing all along the way. It may be difficult in a given case to determine where along the continuum information is distinctly that of one individual and not the other. To ascribe return information to the right person, we recommend setting out the constituent steps taken in establishing that there was fraud and then considering them together with the preceding and subsequent periods. Doing so may help clarify, given the *Martin* test, when the Service's focus shifted or split off from examining the victim's taxable income and credits to building a fraud case against the identity thief. Moreover, we can conceive of a segment of time along the continuum, at the end of the process with the victim and the start of the new process with regard to the perpetrator, during which the return information developed is that of both individuals. The same facts leading to a conclusion that the victim owes no additional tax because of the fictitious Form 1040 may simultaneously form the basis for or relate to a criminal tax investigation of the fraud. Delineating the parameters will indicate whose tax liability (and in relation to what data) was being determined at what point. This alignment of information with liability is the basis for the disclosure to a taxpayer of his or her own return information. *See Martin v. IRS*, 857 F.2d at 725-26 (protests filed by co-partners following an

[12] To undo or negate the effect of the fictitious return on the victim's liability, some corrective actions to the victim's tax module will be necessary. Further discussion with the Service as to what specific information is entered and what information remains after correction will allow us to appropriately categorize the return information by person (victim or perpetrator).

audit of partnership and adjustment of co-partners' returns were return information of co-partners, protected from disclosure by section 6103).

Viewing it in stages, then, when the return is filed it is the victim's return information,[13] and from then until the Service discovers the fraud, the data compiled will be the victim's alone. During that phase, the Service is still trying to determine the existence or amount of the victim's liability for the tax year. When the Service learns of the fraud and that the refund was erroneous, the information on the return then becomes also the return information of the fraud perpetrator. As the Service goes about establishing the extent of the fraud for purposes of civil and criminal liability, the resulting return information is the thief's. Aside from the items off of the fictitious return and any band of overlapping data, other items of return information will be exclusively either the victim's or the thief's return information based on the liability context, but not both—as they do not have joint liability, they do not share joint return information.

ii. Form W-2

In the scenario of the undocumented worker who uses someone else's SSN for employment and tax purposes, the Form W-2 that is filed by the employer is, at that moment, the return of both the employer who filed it and the taxpayer with respect to whom it is filed (the undocumented worker, notwithstanding the errant use of another's SSN).[14] Further, the items of information taken from the Forms W-2 that are filed by the employer in the name of the undocumented worker (employee) (but with the wrong SSN) are the return information of the employee. *See* Joint Committee on Taxation Staff's *General Explanation of the Tax Reform Act of 1976*, 94th Cong., 2d Sess. 315 (1976), 1976-3 (Vol. 2) C.B. 326. The information on the forms is received by the Service (via the SSA) in connection with the employee's tax liability. Further, the Form W-2 information, including the fact that the SSN on the form is not the employee's SSN, is also the employer's return information. The employer files the Form W-2 to comply with section 6051 and the associated regulations as part of his employment tax obligations. The information on Forms W-2 is connected to the employer's liability for employment taxes. The same wage and withholding amounts that are required on Forms W-2 are included in the totals reported throughout the year on the employer's quarterly employment tax returns (Forms 941), and the employer is liable under section 3403 for income taxes not

[13] In fact, until such time as the Service investigates the Form 1040 as the work of an identity thief, the information on the return remains solely the return information of the taxpayer in whose name the return was filed.

[14] Depending upon the timing of the Service's discovery, there may even be a basis for treating the Form W-2 information as also the return information of the true owner of the SSN. When the form is filed, the mismatch between the name and SSN is susceptible to detection by SSA. Our understanding is that until 2006, SSA informed employers of the mismatch. For the last two tax years, SSA has not done so, and it is unclear whether they will restart the practice. If SSA informs the employer (under a resumed practice), or if the Service tells the employer instead, and the employer is cooperative, then the undocumented worker's fraud should ultimately come to light. If a case proceeds in this way, where the Service learns of the fraud early enough, we would expect that the Form W-2 information would not be entered into the Service's records and thus would not be the return information of the victim. Under this scenario, since the taxpayer would suffer no adverse tax consequences, no disclosure regarding the Form W-2 would be necessary. In contrast, if the problem is not detected early, the Service may ask the victim to explain the disparity between the wages on the victim's actual return and in IRP data. The Service may even freeze or reduce the taxpayer's refund or propose a deficiency on account of what appears to be additional income. In that event, the Form W-2 data would arguably be the victim's return information, too.

withheld or paid over. Moreover, the employer can be penalized for not timely filing Forms W-2 or for filing ones that are incomplete or inaccurate.

c. Taxpayer Return Information

A subset of "return information" is "taxpayer return information," which is information "filed with, or furnished to, the Secretary by or on behalf of the taxpayer to whom such return information relates," and includes, by extension, any items on a tax or information return, among other data. I.R.C. § 6103(b)(3). The information on the forms filed in the two fact scenarios is return information. Whether the same information is also "taxpayer return information" under section 6103(b)(3) is another matter.[15] For the Form W-2, the analysis is straightforward. The data is not only return information, it is also "taxpayer return information" under section 6103(b)(3) because it is filed with the Service "by the taxpayer [employer]" and "on behalf of the taxpayer [the undocumented worker] to whom such return information relates"[16]

The refund fraud scenario is somewhat less clear cut. All of the information stemming from the fictitious Form 1040 (the non-return) is return information, some of which is the victim's, some of which is the perpetrator's, and some of which is information of them both. As to the victim, the fictitious return is not taxpayer return information because it was not filed "by or on behalf of the taxpayer to whom such return information relates." "On behalf of" implicitly requires authorization or consent from the taxpayer, which is not true in the typical case of an identity theft tax return. But any other information "furnished to" the Service by the victim, in an effort to correct his tax account, is certainly taxpayer return information.

The fictitious Form 1040 is certainly the perpetrator's return information at it is filed by the perpetrator, but whether the filer is "the taxpayer to whom such return information relates" is a question of first impression. On the one hand, the perpetrator does not file the return as a taxpayer in the ordinary sense. The return is not filed to comply with the perpetrator's own obligation to file an income tax return or as a statement of the perpetrator's taxes for the tax year. As the Form 1040 is also not a return of the taxpayer whose name is on the form, it is not the income tax return of any "taxpayer." Indeed, the return is a fiction and is never intended as a real return at all. It has no tax purpose (as we have explained, it is a nullity) and is only the means to a criminal end. Its essence is no different from any fraudulent, non-tax claim submitted to the government; it just happens to be on a tax form. If the fictitious return is not a return, including as defined in section 6103, and, looking beyond the sham, serves no tax purpose whatsoever, it seems to follow that whoever filed it cannot truly be called a "taxpayer." Using the definition in section 7701(a)(14) of a "taxpayer" as "any person subject to any internal revenue tax," the perpetrator's fraudulent conduct does not by itself subject him to any internal revenue tax. On the other hand, the perpetrator may, broadly, be a "taxpayer" (if subject to tax

[15] Whether return information is also taxpayer return information affects disclosure to outside agencies and officials (see Issue 5, below).

[16] Under a literal reading of section 6103(b)(3), return information filed "with respect to" the taxpayer is not "taxpayer return information." Since the definition of "return" is broader than taxpayer return information, all information extracted from the return will not necessarily be afforded the same protection as the return itself. In the context of section 6103(i) dealing with disclosures for nontax, criminal purposes, this anomaly would seem to undercut congressional intent to accord special protection to all information included on (tax or information) returns. Historically, we have taken the position that any information extracted from an information return is taxpayer return information. Accordingly, in the Form W-2 scenario, the Form W-2, with the appropriated SSN, is the taxpayer return information of the victim as well.

in his own right), though not the taxpayer claimed. Also, the fraudulent document is in the form of an income tax return and is filed with the intent (albeit criminal) to obtain a tax refund. We doubt, however, that furnishing information in the guise of a tax return is sufficient to render the perpetrator who furnished the information a "taxpayer" with respect to the information furnished. The fictitious return is unquestionably return information of the perpetrator because it is compiled by the Service with respect to the perpetrator's liability for a title 26 penalty or offense, and the return is the very evidence that will be used in any fraud case against him. Nevertheless, the return information does not come from the perpetrator qua taxpayer. By defining "taxpayer return information" as return information furnished or filed by a "taxpayer" and not just a "person," presumably Congress meant to limit the term to information that is provided to the Service specifically to comply with the tax laws as they relate to the person who provided (or whose representative provided) the information. In other words, more than a mere connection between the return information furnished and the internal revenue laws, such as the connection between an identity theft return and criminal tax liability, is necessary. In distinguishing taxpayer return information from all other return information, Congress was concerned that information that a taxpayer "is *compelled* by our tax laws to disclose to the Internal Revenue Service" be treated similar to information protected under the Fourth and Fifth Amendments. S. Rep. No. 938, 94th Cong., 2d Sess. 328 (1976), 1976-3 (Vol. 3) C.B 328 (emphasis added). The identity thief, however, files the fictitious return contrary to the tax laws and not in compliance with them. The thief is not "compelled" in any way to file a fictitious return disguised as the return of another. By contrast, a taxpayer who files a fraudulent refund return, even an amended return (or a Form 843 refund claim), in his own name is still filing the return in conformance with the tax laws as they relate to that person, and the return is truly the taxpayer's return. Fraudulent or not, the return is the taxpayer's assertion of liability and an overpayment. The taxpayer cannot obtain a refund without filing the return with the requisite information. A tax return with fraudulently understated or overstated items is not entitled to any less protection (as "taxpayer return information") than a non-fraudulent return, but an identity theft return never takes on the status of a taxpayer's return. On balance, we believe a credible argument may be made that, since the perpetrator is not acting in the role of a "taxpayer" when filing the fictitious return (he is only pretending to be someone else acting in that capacity), the fictitious Form 1040 is not taxpayer return information (of either the victim of the thief). In so concluding, we acknowledge that there is a litigating hazard that a court might interpret the word "taxpayer" in "taxpayer return information" more expansively than we do here (and might construe the legislative history differently).

3. *Whether the Service may notify the victim of the apparent theft of identity and, if so, what information may the Service disclose.*

A taxpayer's own return information may be disclosed to the taxpayer. I.R.C. § 6103(e)(1), (7). Any information relating to the Service's determination of the victim's tax liability for the year can be disclosed to the victim as his return information. This would include any information relating to the original balance due or refund that was based on initially assigning the amounts reported on the fictitious Form 1040 or the erroneous Form W-2 to the victim and the underpayment or overpayment as later adjusted. The cause of the events on the taxpayer's account—suspected

identity theft and use of the SSN on another return—would also be disclosable to the victim as the taxpayer's return information.[17]

Any other information about the fictitious Form 1040 or the incorrect Form W-2, however, and any information about the Service's investigation into the civil or criminal tax liability of the person who misused the SSN (whether the refund fraud perpetrator or the undocumented worker), is not the return information of the victim. As such, it may not be disclosed to the victim because the Code provides no authority for disclosure of a third party's return information to that victim. This includes the perpetrator's identity. *See generally Hodge v. IRS*, 92 A.F.T.R.2d 2003-6241 (D.D.C. 2003) (holding that the name and address of a person who mistakenly used plaintiff's SSN in claiming an exemption for her child on her tax return, was third party return information that could not be disclosed to the plaintiff).[18]

4. *Whether the Service may notify an employer whose worker has used a stolen SSN that the SSN on the Form W-2 filed for that worker belongs to a different taxpayer, and whether the Service may reveal any other information about the apparent identity theft to the employer.*

To reiterate, the fact that the Form W-2 contained the SSN of someone other than the employee is the return information of the employer and thus may be disclosed to the employer. I.R.C. § 6103(e)(1), (7). The employer is required to file a Form W-2 with accurate information and to file a corrected form if necessary (Form W-2c). It would be nonsensical to conclude that the Service may not inform the employer that the SSN on a filed Form W-2 is wrong and in what respect. If the employer is not informed of the incorrect number, then the employer may continue to file Forms W-2 as to the particular employee using the same data. And if the employer is alerted to an error but does not know the nature of the error, the employer may be

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[17] Under this rationale, the letter to taxpayers in the pilot notification program is acceptable. The letter, in relevant part, notifies the recipient of the following:

> The Internal Revenue Service (IRS) recently became aware that someone may have attempted to impersonate you by using your personal information, such as your name and social security number. More than one tax return was filed using your personal information for the 2006 tax year. If a federal tax return was filed without your consent, you may be a victim of identity theft.

[18] Nonetheless, there may be occasions in which the victim will learn of the perpetrator's identity. In the course of the fraud investigation, the Service may need to obtain information from the victim about the target of the investigation, for example, in order to establish whether the perpetrator is known to, and has some sort of relationship with, the victim, such as relatives, colleagues, or neighbors. Under section 6103(k)(6), the Service may disclose return information (but not a return) in a civil or criminal tax investigation to the extent necessary to obtain information, not otherwise reasonably available, for the investigation. *See also* Treas. Reg. § 301.6103(k)(6)-1(a)(1)(iii), (iv) (investigative disclosures include, but are not limited to, establishing or verifying liability or possible liability for any internal revenue "tax, penalty, interest, fine, forfeiture, or other imposition or offense," or to establish or verify "misconduct (or possible misconduct) or other activity proscribed by the internal revenue laws or related statutes"). Information is not "otherwise reasonably available" when it "cannot be obtained in a sufficiently accurate or probative form, or in a timely manner, and without impairing" the investigation. Treas. Reg. § 301.6103(k)(6)-1(c)(3). Pursuant to this authority, CI special agents investigating the identity thief's criminal fraud could disclose the thief's identity to the victim if necessary to obtain information that the victim has relating to the fraud and that cannot reasonably be obtained in some other way. We caution, however, that this investigative disclosure authority may not be used simply to notify the victim of the fraud, nor may it be part of any *quid pro quo* arrangement. Treas. Reg. § 301.6103(k)(6)-1(c)(1).

effectively unable to correct it. Any information beyond the two basic facts of a mismatch between name and SSN and that the number is another's (*e.g.*, the identity of the true owner of the SSN), however, cannot be disclosed to the employer as his own return information.

There may also be times when the Service proposes to assess penalties against the employer for filing Form W-2 with an incorrect SSN on the basis that the employer was aware or should have been aware that an employee was using another taxpayer's SSN. The fact the SSN belonged to another taxpayer would be the employer's return information for the additional reason that it is the predicate for the penalty.[19] Whether other information about the theft or misuse of the SSN could be disclosed to the employer as return information relating to the penalty would need to be determined on a case-by-case basis.

5. *Whether the IRS may tell appropriate (non-tax) law enforcement officials about an apparent identity theft situation.*

Section 6103 allows for disclosure of returns and return information to (non-tax) law enforcement in limited circumstances. The authority for disclosures to federal law enforcement is in section 6103(i), which has several parts. Of relevance herein, is section 6103(i)(3)(A), which provides limited authority for the Service to make proactive disclosures to alert another federal criminal law enforcement agency of a possible non-tax crime.

Under section 6103(i)(3)(A)(i), the Service may disclose return information, but *not* taxpayer return information, that "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." The information disclosed can include the taxpayer's identity (which is taxpayer return information) but *only* if there is other return information (which is not taxpayer return information) that may evidence the taxpayer's possible violation of a federal criminal law. I.R.C. § 6103(i)(3)(A)(ii).

Section 6103(i)(3)(A) would be the only arguable authority for the Service to proactively tell another federal agency of a suspected theft of a taxpayer's SSN, including the taxpayer's name, the identity of the perpetrator (if known), and information about the fraud or misuse of the SSN that constitutes evidence of a non-tax federal crime. The problem in the Form W-2 scenario is that *all* of the information the Service would want to disclose constitutes taxpayer return information. Once it is determined that the return information is "taxpayer return information" of anyone—whether it be the employer, the undocumented worker, the identity theft victim, or any combination thereof—the proactive disclosure of that information to other federal agencies for non-tax law enforcement is prohibited. In contrast, in the refund fraud situation, given our conclusion that the fictitious Form 1040 is a "nullity," and therefore not a return, nor is the information taken from it "taxpayer return information," the Service would be in a position to alert federal criminal law enforcement officials of this scenario

[19] The identity of the true owner of the SSN, however, is not the employer's return information. It remains the return information (which includes a "taxpayer's identity") of the true owner. In the context of an audit or judicial proceeding with the employer over a penalty, section 6103(h)(4)(B) may provide authority for this disclosure if "directly related" to the resolution of the penalty issue.

CASE DEVELOPMENT AND LITIGATING HAZARDS

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Please call me at (202) 622-3400 if you have any questions or if we can be of further assistance.