

General Information Letter: Employees using false names or identification numbers are entitled to a credit for taxes they can prove were withheld from their wages.

May 3, 2010

Dear:

This is in response to your letter dated March 27, 2010 in which you state the following:

Issues: I have clients who are living in the United States illegally and working in the state of Illinois either with a stolen identity or with their own name and a fraudulent tax identification number.

I need a legal ruling or an explanation in writing as to the taxpayer rights and obligations for this class of taxpayer.

Pertinent questions I want addressed:

1. Are they required to file a return using an ITIN and pay tax on their income earned in Illinois?
2. Are they allowed to claim the withholdings present on the forms W-2 even though in many instances there exists a name and tax identification mismatch?
3. If the answer to question two is (no) is it better for individuals in this class of taxpayer to claim exempt from Illinois withholding and pay the tax owed at year end when they file their returns? Rationale: the penalty for late payment for underpayment of estimated tax is small in comparison to the otherwise disallowed withholdings. The department of revenue disallowing the withholdings due to the mismatch and then requiring payment again is a form of double taxation.
4. If the answer to question two is (yes) what documentary evidence is required from an individual in this class to verify that the income and withholdings present on the form W-2 submitted with the tax return do in fact belong to the taxpayer.

Federal positions considered for preparing federal returns in our office  
<http://www.irs.gov/taxpros/article/0,,id=167629,00.html>

### **Isn't it illegal for people to use the SSN of another person?**

Yes, but the Internal Revenue Code does not distinguish between legal or illegal income. Regardless of how the income was earned, if it is taxable income, the person who received the income is required to file a federal tax return and report the income. Individuals with ITIN/SSN mismatches on their tax returns have always been required to file – this change just makes it possible to file the return using the IRS *e-file* system.

### **Will the W-2 wages be credited to the ITIN holder? How will this affect the person whose SSN is being used?**

The wages are reported as being earned by the ITIN holder, and are taxable to the ITIN holder. The change will make it easier for IRS systems to associate the wages with the ITIN holder. This will stop the IRS from sending a notice to the person whose SSN is being used and eliminated the need for that person to prove that they did not earn the wages.

**Internal Revenue Manual 5.1.12.2.2.3.2 (05-20-2008)**

**ID Theft for Purposes of than Tax Evasion**

1. If a taxpayer performed ID theft by using someone else's Taxpayer Identification Number (TIN) for purposes **other** than tax evasion, it is **not** a concern that the IRS would handle. Criminal Investigation (CI) would **not** work such cases.

Example: A taxpayer is an illegal alien. The taxpayer filed a return to report his/her wages but he/she used someone else's Taxpayer Identification Number (TIN). However, the taxpayer paid the tax he/she owed.

2. Do **not** alert those individuals who were victims of ID theft. Disclosure laws prohibit making any such notification.

**Internal Revenue Manual 21.6.2.4.3.8 (10-01-2007)**

**Mixed Entity Invalid SSN – TC 576**

1. When a mixed entity occurs on an invalid SSN, use procedures in IRM 21.6.2.4.3.5, *Invalid SSN – Mixed Entity*.
11. Do not scramble cases involving the following. Follow mixed entity procedures.
  - a. The taxpayer indicates that they purchased, borrowed or stole the SSN. The caseworker may receive this information directly from the taxpayer or through another IRS employee or Treasury Inspector General for Tax Administration (TIGTA).

**The common number is an ITIN or invalid SSN.**

**Internal Revenue Manual 21.6.2.4.3.5 (10-01-2005).**

**Invalid SSN – Mixed Entity**

1. When a mixed entity situation occurs on an invalid SSN, take the following actions:  
If a different valid TIN is located for each taxpayer

Then

1. \*\*\*\*\*
2. Input a TC041 to move data on the invalid TIN to taxpayer A's valid TIN.
3. \*\*\*\*\*

I would appreciate any guidance possible as the instructions provided for the preparation of Illinois returns is silent as to this class of taxpayers.

According to the Department of Revenue ("Department") regulations, the Department may issue only two types of letter rulings: Private Letter Rulings ("PLR") and General Information Letters ("GIL"). The regulations explaining these two types of rulings issued by the Department can be found in 2

Ill. Adm. Code §1200, or on the website <http://www.tax.illinois.gov/LegalInformation/regs/part1200>.

Due to the nature of your inquiry and the information presented in your letter, we are required to respond with a GIL. GILs are designed to provide background information on specific topics. GILs, however, are not binding on the Department.

In response to your first inquiry, please be advised that Section 502(a) of the Illinois Income Tax Act ("IITA," 35 ILCS 5/101 et seq.) governs the filing of returns and provides as follows:

- (a) In general. A return with respect to the taxes imposed by this Act shall be made by every person for any taxable year:
  - (1) for which such person is liable for a tax imposed by this Act, or
  - (2) in the case of a resident ... for which such person is required to make a federal income tax return, regardless of whether such person is liable for a tax imposed by this Act. However, this paragraph shall not require a resident to make a return if such person has an Illinois base income of the basic amount in section 203(b) or less and is either claimed as a dependent on another person's tax return under the Internal Revenue code of 1986, or is claimed as a dependent on another person's tax return under this Act.

Based on the above language of the IITA, your clients must file Illinois returns regardless of their legal status if they owe Illinois income taxes or if residents of Illinois and they are required to file a federal return, provided of course, that none of the exceptions listed in IITA 502(a)(2) apply to the taxpayers. This is consistent with the instructions to the Illinois income tax return which states on page 3 that "[a] nonresident alien taxpayer is not exempt from tax. If your income is taxed under federal income tax law, it is taxed by Illinois."

Your second question asks whether taxpayers may claim their withholdings on an Illinois return when the name and/or tax identification on the W-2 does not match that of the taxpayer. Pursuant to IITA Section 601(b)(1), taxpayers claiming "income" are entitled to the amount withheld from such compensation paid to them. The specific language is as follows:

- (b) Amount payable. In making payment as provided in this section there shall remain payable only the balance of such tax remaining due after giving effect to the following:
  - (1) Withheld tax. Any amount withheld during any calendar year pursuant to Article 7 from compensation paid to a taxpayer shall be deemed to have been paid on account of any tax imposed by subsections 201(a) and (b) of this Act on such taxpayer for his taxable year beginning in such calendar year. If more than one taxable year begins in a calendar year, such amount shall be deemed to have been paid on account of such tax for the last taxable year so beginning.

Because the answer to your second question is "yes" based on the above IITA provision, your next inquiry is what documentary evidence is required to verify that the income and withholdings present on the W-2 form do in fact belong to the taxpayer. The Department would accept the same documentation the IRS would accept. IITA Section 506.5 allows Illinois withholding based on receipt of proof that the IRS allowed the withholding:

506.5: Returns based on Substitute W-2 Forms.

For a taxpayer who has received wages from an employer in Illinois, loses or was not provided a W-2 form, is unable to obtain a duplicate W-2 form from the employer, and subsequently obtains a substitute W-2 form from the Internal Revenue Service, it shall be presumed that tax was withheld under Article 7 of this Act in an appropriate amount based on the number of withholding exemptions used to determine the federal income tax withholding for the taxpayer if (i) the substitute W-2 form indicates the appropriate amount of federal taxes withheld, (ii) the taxpayer files a copy of the substitute W-2 form with his or her Illinois income tax return, and (iii) the taxpayer provides a mailing address to which any correspondence or refund, if any, may be sent.

As stated above, this is a general information letter which does not constitute a statement of policy that either applies, interprets or prescribes tax law. It is not binding on the Department. Should you have additional questions, please do not hesitate to contact our office.

Sincerely,

Heidi Scott  
Staff Attorney -- Income Tax