



OFFICE OF  
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224  
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

FROM: ASSISTANT CHIEF COUNSEL (FIELD SERVICE)  
CC:DOM:FS:PROC

SUBJECT: INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD  
SERVICE ADVICE

This Field Service Advice responds to your memorandum dated February 29, 2000. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND

Taxpayer =

VITA Site =

State =

District =

Year 1 =

\$a

ISSUE

Whether the Service is required to issue a second refund where the Taxpayer used the Volunteer Income Tax Assistance (VITA) program to electronically file her return and a person with access to the VITA Site subsequently changed the account and routing numbers for her refund deposit so that a third person obtained Taxpayer's refund.

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## CONCLUSION

The Service may issue a second refund to the Taxpayer.

## FACTS

The Taxpayer is in the military stationed at the VITA Site. The military has a large presence in the State and prepares a significant portion of the tax returns in the VITA program in the District. The Taxpayer participated in the VITA program at the VITA Site on February 17, Year 1. The Taxpayer filed her return electronically with the help of a military volunteer in the VITA program and received a copy of the return and the Form 8453 authorizing the electronic filing.

On March 12, Year 1, the Taxpayer called the Service and a recording told her that the refund based upon that return had been deposited in her bank account. On March 19, Year 1, the Taxpayer received an insufficient funds notice and realized that the refund had not been deposited in her account. During the next several weeks, the Taxpayer contacted Service personnel in various locations in an attempt to ascertain what happened, and to seek another refund. On April 9, Year 1, the Taxpayer went to her superior officer and military security. On the same date, a Service employee told the Taxpayer that the return was transmitted incorrectly by the VITA volunteer and that the refund was a civil matter between the Taxpayer and the VITA volunteer because the Service had done nothing wrong. The employee also gave the Taxpayer the routing and account numbers for the refund so that the Taxpayer could discover where the refund went. According to our files, the Taxpayer has not filed a Form 3911, Taxpayer Statement Regarding Refund.

The Taxpayer was able to ascertain the bank and the account the refund had gone into and gave that information to the Service and to military security. Military security investigated the matter, after the Service's Criminal Investigation Division declined to, and learned that an unidentified person changed the account and routing numbers in the Taxpayer's refund request two to three hours after she left the VITA site. The military does not know who altered the return information. The refund, in the amount of \$a, went into the account of a navy sailor stationed in the State. The sailor immediately spent the money. The sailor denied having knowledge of how the refund money got into his account and when he took a lie detector test administered by military security, the results were inconclusive. Military security believes it likely that the sailor had a friend, or perhaps a person who owed him a gambling debt, who had access to the computers the military used for VITA and used the edit function to change the routing and account numbers.

After the military investigation was completed with inconclusive results and no action taken, the military reimbursed the Taxpayer for her missing \$a refund in early

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May, Year 1. The military has requested that the Taxpayer be refunded her misappropriated refund. The Taxpayer intends to reimburse the military with the proceeds of the reissued refund.

## LAW AND ANALYSIS

I.R.C. § 6402(a) provides that in the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c), (d) or (e), refund any balance to such person. See Treas. Reg. § 301-6402-1.

I.R.C. § 6401(a) provides that the term “overpayment” includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto. An overpayment is the amount by which the payments made by the taxpayer exceed the correct tax liability. Jones v. Liberty Glass Co., 332 U.S. 524 (1947); 1948-1 C.B. 102. A taxpayer must be able to prove that an overpayment exists before a refund can be made. Lewis v. Reynolds, 284 U.S. 281 (1932). An overpayment will not exist once the amounts paid by the taxpayer have been refunded to the taxpayer and the account no longer shows a credit balance. Whether an overpayment has been refunded to the taxpayer requires a review of the facts of the case.

The government generally enjoys a presumption of official regularity. United States v. Ahrens, 530 F.2d 781, 785 (8<sup>th</sup> Cir. 1976). There is also a presumption that a properly sealed, stamped, addressed, and mailed letter arrives in the due course of the mail. Charlson Realty Co. v. United States, 384 F.2d 434, 442 (Ct. Cl. 1967). However, both presumptions are rebuttable. In the case of claims of nonreceipt of refunds made by paper check, the government bears the burden of showing that the refund check was issued and cashed. The burden then shifts to the taxpayer to show that the check was lost, stolen, destroyed, or never received. Bolnick v. Commissioner, 44 T.C. 245 (1965), acq. 1980-1 C.B. 1.

A mere indication on the Service’s records of the Taxpayer’s account that there has been a debit for the amount of the overpaid tax to be refunded is not sufficient to substantiate that a refund has actually been made. Similarly, the issuance of a refund check will not necessarily satisfy the Service’s underlying obligation to the taxpayer to refund the amount claimed. The fact that the Service did nothing wrong (i.e., placed a negotiable in the mail properly addressed to the taxpayer) creates a presumption that the refund was received by the Taxpayer and that the overpayment has been extinguished. However, if the taxpayer provides evidence

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rebutting the presumption that the check was received (e.g., evidence that the check was lost in the mail or stolen before receipt) then it is proper to issue a new check. In Bolnick, for example, the taxpayers maintained that they never received a refund of the amount shown as an overpayment on their income tax return. The Commissioner proved that a refund check was issued to the taxpayers, but the Tax Court was convinced by the taxpayers' evidence that they never received the check. Thus, the Tax Court held against the government, concluding that the taxpayers rebutted the presumption that a refund check was delivered in the ordinary course of delivery of the mail.

Situations in which direct deposits are stolen, which appears to be the case here, should be extremely rare. However, when they do occur, we believe the Service is legally permitted to reissue the refund to the taxpayer. There is no case law directly on point regarding recovery if a volunteer under a VITA program misdirects a refund by altering taxpayer information.<sup>1</sup> The only guidance regarding erroneous deposits resulting from electronically filed returns is Service Center Advice 1998017. That Service Center Advice provides that where the bank improperly deposits sums into the account of a third party through no fault of the Service, the Service is not obligated to pay the bank. The bank must recover from the owners of the account to which the sums were erroneously deposited. See U.C.C. § 4A-303(c). The Service Center Advice also states that where the Service has made an error with respect to a direct deposit, the risk of loss is on the Service.

However, this situation appears most closely analogous to the stolen refund check situation. Insofar as I.R.C. § 6402 is concerned, there is no legal impediment to issuing another refund to the taxpayer if a check is stolen even though the Service was not at fault. Similarly, there should be no legal impediment to reissuing a direct deposit refund.

The process for determining if a replacement refund check should be issued to a taxpayer is described in IRM 21.4.2, Refund Trace and Limited Payability. In these cases, the taxpayer generally files a Form 3911, Taxpayer Statement Regarding Refund, claiming that the original refund check was either lost, stolen or destroyed, and requests a replacement check. See IRM 21.4.1.3.1.3. If the Service determines that the taxpayer's claim is valid, it issues a replacement refund check to the taxpayer.

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<sup>1</sup>Treas. Reg. § 301.7701-15(a)(7) provides that any individual who provides tax assistance under a VITA program established by the Service, and any organization sponsoring or administering a VITA program, is not considered to be an income tax return preparer. Consequently, certified VITA volunteers are not subject to the requirements and penalties applicable to income tax return preparers. P.L.R. 9442003 (Oct. 21, 1994).

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Suit to Recover Erroneous Refund

You also inquired whether the Service must request a suit to recover erroneous refund before it can issue a second refund to the Taxpayer.

In this situation, the erroneous refund suit is irrelevant to the issue of whether the Service can issue a second refund to the Taxpayer. A suit to recover erroneous refund is a separate issue involving whether the Service desires to recoup its funds. It does not affect whether the Service should reissue a refund to the Taxpayer. As stated infra, the Service may reissue a second refund to the Taxpayer since it is clear the Taxpayer never received the first refund.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

Since there is no legal impediment to making the refund, and the Taxpayer plans to reimburse the military, the Taxpayer will not be unjustly enriched. Therefore, we believe the refund should be issued. We suggest that you urge the military to consider whether taxpayer information is sufficiently secure, with a view to preventing another incident of this type.

Please call if you have any further questions.

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