UNITED STATES TAX COURT
WASHINGTON, DC 20217

KUMAR RAJAGOPALAN & SUSAMMA KUMAR, ET AL.,	)	**SD**
Petitioner(s),	)	
v.	)	Docket No. 21394-11, 21575-11.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

ORDER

These consolidated cases were tried during the Court's June 2015 trial session in Birmingham, Alabama. They are conservation-easement cases, but penalties -- and the Commissioner's compliance with I.R.C. § 6751(b)(1) -- have thus far taken center stage. We've already decided that it's too late for the Commissioner to introduce additional evidence that he complied with § 6751(b)(1) for the 40% gross-valuation-misstatement penalties raised in his amended answers. *See Rajagopalan v. Commissioner*, Docket No. 21394-11, Order, Dec. 20, 2017. (We note, however, that he did produce some evidence of that compliance which the parties analyze in their posttrial briefs.) Now he asks us to reopen the record to let in evidence to show that he complied with that section for the 20% accuracy-related penalties determined in his notices of deficiency. Petitioners object.

Once again we find ourselves staring at a *Chai* ghoul. This one presents this division with its closest call yet on the motions to reopen prompted by *Chai v. Commissioner*, 851 F.3d 190 (2d Cir. 2017), *aff'g in part, rev'g in part* 109 T.C.M. 1206, and *Graev v. Commissioner*, 149 T.C. ___ (Dec. 20, 2017) (*Graev III*).

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Background

In our December Order, we went into detail about the evidentiary timeline in these cases and the recent evolution of § 6751 jurisprudence. *See* Order, *supra*, at 2-5. Much of that is the same here, and we'll skip to the important similarities and differences:

- The Commissioner wants to add evidence that he complied with § 6751 before he determined that petitioners were liable for 20% accuracy-related penalties.

- The Commissioner did not introduce evidence of his compliance at trial, and the parties never stipulated to his compliance.

- In their posttrial briefs, petitioners primarily argued that the Commissioner failed to comply with § 6751 for the 40% penalties, but they also argued that "no approval was requested or obtained for the application of *any* penalties in this case." (Emphasis added).

- In their posttrial briefs, petitioners also focused on a penalty-approval form that they had obtained through a Freedom of Information Act (FOIA) request. This form listed SS Mountain LLC -- the non-TEFRA partnership in which the Sapps, Mr. Rajagopalan, and Ms. Kumar were the partners -- as the taxpayer. It showed that the IRS did not assert a penalty. Petitioners argue in their briefs that this shows the Commissioner failed to comply with § 6751(b). The Commissioner counterargues in his posttrial brief that the form also states that the "[n]egligence penalty is applicable at partner level." This form hadn't been admitted into evidence at trial, but petitioners' argument means that both parties -- if not the Court -- knew it existed even before trial began. And, as we stated in the December Order, both sides briefed the § 6751(b) issue in a fair amount of detail.

- The trial and briefing in these cases were completed well before the release of *Graev v. Commissioner*, 147 T.C. ___ (Nov. 30, 2016) (*Graev II*), *Chai*, and *Graev III*.

What exactly does the Commissioner want to add to the record? The Commissioner moved about two months ago to reopen the trial record to add the approval forms for the 20% accuracy-related penalties that he had determined in

the notices of deficiency. These forms list the individual partners as the taxpayers. In support of his motion, he submitted IRS supervisor Esther Hunt's declaration to authenticate the forms and show how she came to approve her subordinate's penalty determinations. The penalty-approval forms were signed in February 2010 and list L. Swagger as the examiner. In her declaration, Ms. Hunt says she was Lashara Swagger's immediate supervisor and she signed the forms to approve Ms. Swagger's determination of penalties. Ms. Hunt doesn't say whether the penalty determinations were *initial* determinations, and the forms themselves approve the 20% accuracy-related penalties only on negligence grounds.

Should we reopen the record now to let these penalty-approval forms in? Petitioners say we shouldn't. They incorporate arguments from their response to the Commissioner's first motion to reopen -- that the Commissioner's failure to introduce the penalty-approval forms at trial shows a lack of diligence or, worse, "a calculated risk" that didn't work out, and petitioners would be prejudiced if the penalty-approval forms were admitted into evidence now when they don't have the opportunity to examine and question the evidence. And they go even further, and argue that they should be "entitled to question" the supervisor and subordinate to confirm that the penalties "were properly asserted and whether [the Commissioner] complied with Code section 6751(b)." They also say that they must "be entitled to discovery of email exchanges or memoranda exchanged between the individuals making the initial determinations and the immediate supervisors approving those penalties." "Without this evidence," petitioners argue, they are "deprived of the opportunity to establish that the Service failed to comply with Code section 6751 in asserting the penalties at issue in this case."[1]

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[1] Petitioners also argue about a species of *Chai* ghoul whose existence this division of the Court predicted would be found eventually, but which would emerge here only if we admit the penalty-approval forms: What happens when a penalty-approval form approves the initial determination of accuracy-related penalties only on negligence grounds? *See Graev v. Commissioner*, 149 T.C. ___, ___ (Dec. 20, 2017) (slip op. at 46-47) (Holmes, J., concurring). If we determine the taxpayer wasn't negligent but accuracy-related penalties are justified for another reason (e.g., substantial understatement), can we find that the Commissioner complied with § 6751(b)(1)?

Analysis

The legal standard that this division of the Court relies on for these motions is well defined in the December Order, *see* Order, *supra*, at 5-9, so we won't repeat it here. But recall that we have broad discretion. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971); *Hibiscus Assocs. Ltd. v. Bd. of Trs. of the Policemen & Firemen Ret. Sys. of the City of Detroit*, 50 F.3d 908, 917-18 (11th Cir. 1995). And there are two notable distinctions about the Commissioner's motion here that cause us to exercise our discretion in the Commissioner's favor this time around.

As the parties might remember, our discretion is limited. We won't reopen the record unless the evidence that the Commissioner seeks to add to the record is not merely cumulative or impeaching, is material to the issues involved, and probably would change the outcome of the case. *Butler v. Commissioner*, 114 T.C. 276, 287 (2000), *abrogated on other grounds by Porter v. Commissioner*, 132 T.C. 203 (2009); *see also Garcia v. Woman's Hosp. of Tex.*, 97 F.3d 810, 814 (5th Cir. 1996) (trial court should consider "*the importance and probative value of the evidence*, the reason for the moving party's failure to introduce the evidence earlier, and the possibility of prejudice to the non-moving party") (emphasis added).[2] But even if the evidence passes that test, we still need to weigh the Commissioner's diligence (or lack thereof) against any possible prejudice to petitioners if we were to grant the motion to reopen the record. *See Snuggery-Elvis P'ship v. Commissioner*, 64 T.C.M. 1128, 1132 (1992) (citing *Zenith Radio Corp.*, 401 U.S. at 332-33; *Purex Corp. v. Procter & Gamble Co.*, 664 F.2d 1105, 1109 (9th Cir. 1981); *Mayer v. Higgins*, 208 F.2d 781, 783 (2d Cir. 1953); *Glagola v.*

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[2] This Fifth Circuit case was decided after September 30, 1981, *see Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), but our research turned up few cases in the Eleventh Circuit that involved a prejudgment motion to reopen the record. And those cases only determine whether there was an abuse of discretion; they don't provide an analytical framework. *See, e.g.*, *Hibiscus Assocs. Ltd. v. Bd. of Trs. of the Policemen & Firemen Ret. Sys. of the City of Detroit*, 50 F.3d 908, 917-18 (11th Cir. 1995); *Lundgren v. McDaniel*, 814 F.2d 600, 607 (11th Cir. 1987). In *United States v. Byrd*, 403 F.3d 1278 (11th Cir. 2005), however, the Eleventh Circuit found it helpful to look to the Fifth Circuit's precedent about reopening the record. *See id.* at 1283 n.1 (resorting in criminal case to specific Fifth Circuit test to determine if trial court abused its discretion when it didn't reopen the record for criminal defendant to testify). We will do likewise.

Commissioner, 59 T.C.M. 321 (1990)). And "prejudice" in this context focuses on whether the submission after trial prevents the nonmoving party from examining and questioning the evidence as it would have during the proceeding. *Estate of Freedman v. Commissioner*, 93 T.C.M. 1007, 1013 (2007); *Megibow v. Commissioner*, 87 T.C.M. 987, 991 (2004).

As we explained in our December Order, *see* Order, *supra*, at 6-8, we find the question of the Commissioner's diligence a little muddled. There is, for example, still reason to believe that the Commissioner should've anticipated the § 6751 issue and tried to introduce the penalty-approval forms at trial. But there are differences between that motion and this one.

First, the penalty-approval forms are actually admissible *and* they pass the first test for reopening the record. Unlike the hearsay declaration that the Commissioner attached to the motion to reopen and admit additional evidence about the 40% gross-valuation-misstatement penalty, the penalty-approval forms would be admissible under the business-records exception to the hearsay rule under Federal Rule of Evidence 803(6). The IRS supervisor's declaration is in part the sort of routine business-records declaration that we use to get noncontroversial evidence in all the time. FRE 902(11) *does* require that "[b]efore the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record -- and must make the record and certification available for inspection -- so that the party has a fair opportunity to challenge them."

This does give us pause. The Commissioner did *not* give any notice of his intent to introduce these forms on the ground that they were unnecessary. But he did give at least the SS Mountain LLC form, via a FOIA request, to petitioners before trial and that form stated that he would assert the negligence penalty at the partner level. We also note that no one has challenged their authenticity or eligibility for admission as a business record under FRE 803(6). The authentication rules that allow downloads of computerized records are not meant to be high hurdles -- the Advisory Committee Notes suggest we can establish compliance through judicial notice, which we are inclined to do here if the declaration were not enough. *See* Fed. R. Evid. 901 advisory committee's notes. We also can't say that the forms are merely cumulative or impeaching; and they are material and could change the outcome of the case, because they tend to prove -- at least for the negligence penalty -- that the IRS complied with § 6751. *See Butler*, 114 T.C. at 287.

Second, unlike with the evidence that the Commissioner wanted to admit for the 40% gross-valuation-misstatement penalties, we are not convinced that petitioners would be prejudiced by our decision to reopen the record to admit the penalty-approval forms. The Commissioner sought to admit a hearsay declaration as evidence of § 6751 compliance for the 40% penalty, and we agreed with petitioners that they would be prejudiced by that because the declaration seemed to be "a self-serving statement prepared . . . over two years after the trial in these consolidated cases concluded." *See* Order, *supra*, at 9. Petitioners needed to be able to cross-examine the IRS Chief Counsel supervisor.

But the penalty-approval forms here are different. They are evidence that we would likely have admitted at trial under the business-records exception to hearsay -- just as we are doing now -- and it is unclear how petitioners would've benefitted from cross-examination. Petitioners don't make a convincing case that introducing these forms at trial would've made any difference to them: They primarily argue that they should be "entitled to question" the supervisor and subordinate to confirm that the penalties "were properly asserted and whether [the Commissioner] complied with Code section 6751(b)." The penalty-approval forms either answer those questions or they don't; once they are in under the business-records exception, they are in. And we can't conclude this time that petitioners would be prejudiced.

The Commissioner could've been more diligent. But petitioners could have been as well--at trial, both parties were on notice that the Commissioner sought a negligence penalty, and in those days before *Chai* it was not at all clear that the burden of production in raising the Commissioner's noncompliance with § 6751 would fall on the Commissioner rather than being an affirmative defense for taxpayers. Yet neither raised it. After *Chai* and *Graev III,* it appears to us that whatever lack of diligence is chargeable to the Commissioner is counterbalanced by the probative value of the evidence and the lack of prejudice to petitioners.

We do agree with petitioners, however, that the forms show that only the negligence ground for the 20% accuracy-related penalty was approved.

It is therefore

ORDERED that respondent's November 13, 2017 motion to reopen the record is granted to the extent it seeks the admission of the penalty-approval forms attached to his motion. It is further

ORDERED that exhibits 42-R and 43-R are received into evidence. It is further

ORDERED that the record in these cases are closed.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
January 31, 2018