 RMM

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Peter E. Hendrickson & Doreen M. Hendrickson,	)	
	)	
Petitioners,	)	
	)	
v.	)	Docket No. 6863-14.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

This case was tried on March 29, 2017, and remains under consideration by the Court. One of the issues in this case is whether the Hendricksons are liable for a fraud penalty under section 6663.[1] Before us is a motion by the Commissioner to reopen the record in this case so that he may offer evidence of supervisory approval of that penalty. See sec. 6751(b).

A little background might be helpful. Section 6751(b) requires written supervisory approval of the initial determination of certain penalties. The determination of a penalty under section 6663 is among those that requires supervisory approval under section 6751(b). Section 7491(c) places the burden of production on the Commissioner with respect to the liability of any individual for any penalty. In Graev v. Commissioner, 147 T.C. ___ (Nov. 30, 2016) (Graev II),[2] we held that the question of whether a penalty was properly approved under section 6751(b) was premature in a deficiency case (i.e., prior to assessment of the penalty). While Graev II was still before this Court, the Court of Appeals for the Second Circuit disagreed. See Chai v. Commissioner, 851 F.3d 190 (2d Cir. 2017). It held that section "6751(b)(1) requires written approval of the initial penalty determination no later than the date the IRS issues the notice of deficiency

[1]All section references are to the Internal Revenue Code in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure, unless otherwise indicated.

[2] We use Graev II and Graev III to refer to specific opinions discussed in this order. Other than this footnote, we do not refer to an earlier opinion, Graev v. Commissioner, 140 T.C. 377 (2013) (Graev I).

SERVED Feb 27 2018

(or files an answer or amended answer) asserting such penalty." Id. at 221. Prompted by Chai, we revisited Graev II. We recently held that the Commissioner's burden of production under section 7491(c) includes establishing compliance with the supervisory approval requirement of section 6751(b). Graev v. Commissioner, 149 T.C. ___ (Dec. 20, 2017) (Graev III).

This case was held for trial after we issued our opinion in Graev II, mere days after the Court of Appeals for the Second Circuit issued its opinion in Chai, but before we issued our opinion in Graev III. The day after the Court issued its opinion in Graev III, we ordered the parties to address its effect on this case. The Commissioner responded by stating his intention to move to reopen the record. The Hendricksons responded by setting forth their objections to reopening the record. On February 14, 2018, the Commissioner filed a motion to reopen the record to submit evidence of supervisory approval of the fraud penalty asserted in this case. The Court provided the Hendricksons with an opportunity to provide any further objections beyond those that they had already articulated. They responded, principally by addressing the evidence that the Commissioner has proffered.

Discussion

It is well established that the decision to reopen the record rests within the discretion of the trial court. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 331 (1971); see also Noble v. Nat'l Mines Corp., 774 F.2d 144, 149 (6th Cir. 1985) ("[T]he decision to re-open the record is one committed to the sound discretion of the trial court, and will be overturned on appeal only for an abuse of discretion."). We have previously held that we may reopen the record if "the evidence relied on is not merely cumulative or impeaching, the evidence is material to the issues involved, and the evidence probably would change the outcome of the case." Butler v. Commissioner, 114 T.C. 276, 287 (2000).

The submission of evidence relating to supervisory approval of the fraud penalty at issue would not result in the presentation of cumulative evidence in this case. Nor would such evidence impeach or contradict evidence that is currently in the record. Evidence of whether the penalty was properly approved is material to the question of whether the Commissioner met his burden of production under section 7491(c), and given the current absence of any such evidence in the record, evidence of penalty approval has the potential to change the outcome as to the fraud penalty at issue in this case.

The Hendricksons argue that in their deficiency case, the Commissioner bore the section 6751(b) burden of production all along. They contend that because Chai was decided the week before trial in this case, the Commissioner should have known that Graev II would be reversed and that the Court would adopt the rationale of Chai. We disagree.

Chai had (and has) no bearing on this case. At the time of trial in this case, Graev II was the controlling precedent. As a court with nationwide jurisdiction, we "foster uniformity by giving effect to our own views in cases appealable to courts whose views have not yet been expressed". Golsen v. Commissioner, 54 T.C. 742, 757 (1970), aff'd, 445 F.2d 985 (10th Cir. 1971). The Court of Appeals for the Sixth Circuit, to which this case is appealable, has not addressed the interplay between sections 6751(b) and 7491(c). The Hendricksons are correct that at the time of trial, the Court of Appeals for the Second Circuit had recently issued its opinion in Chai wherein it expressed its disagreement with Graev II, but "it is our best judgment that better judicial administration requires us to follow a Court of Appeals decision which is squarely in point where appeal from our decision lies to that Court of Appeals and to that court alone." Golsen, 54 T.C. at 757. This case not being appealable to the Second Circuit, Graev II remained the controlling precedent at the time of trial of this case. Chai had no bearing on this case.

This brings us back to the state of the law in the Tax Court at the time of trial in this case. At the time of trial, we considered the issue of whether the initial penalty determination was approved in writing by the immediate supervisor of the person making that determination to be premature. By allowing the record to be reopened, we put the parties in the position they would have occupied if Graev III had been controlling precedent at the time of trial, as it is now.

The Court has a previously scheduled trial session set for Detroit, Michigan beginning on March 19, 2018, at which the undersigned judge will preside. Accordingly, it is

ORDERED that the Commissioner's Motion to Reopen the Record, filed February 14, 2018, is granted. It is further

ORDERED that this case is calendared as part of the Court's previously scheduled trial session for the further trial solely as to the issue of the Commissioner's compliance with section 6751(b) at the time and date certain of 9:00 a.m., on Tuesday March 20, 2018, in Courtroom 237, United States District

Court, Levin U.S. Courthouse, 231 W. Lafayette Blvd., Detroit, Michigan 48226. It is further

ORDERED that any documents to be offered at the March 20, 2018, trial shall be provided by the offering party to the opposing party by March 12, 2018. It is further

ORDERED that any witnesses to be called at the March 20, 2018, trial (along with a summary of their anticipated testimony including the expected duration of their testimony) shall be identified in a response to this Order to be filed with the Court and served on the opposing party by March 12, 2018.

(Signed) Ronald L. Buch
Judge

Dated: Washington, D.C.
February 27, 2018