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UNITED STATES TAX COURT
WASHINGTON, DC 20217

RITCHIE N. STEVENS & JULIE A. KEEN STEVENS, ET AL.,	)	
Petitioner(s),	)	
v.	)	Docket No. 29815-13, 9539-15.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

Respondent has moved pursuant to Rule 50, Tax Court Rules of Practice and Procedure, to reopen the record to allow him to admit evidence to establish that he has met the requirements of section 6751(b)(1) in determining section 6662 accuracy-related penalties with respect to petitioners' 2008 and 2010 income tax liabilities (motion).[1] Petitioners object. We will grant the motion.

Background

In a statutory notice of deficiency dated January 13, 2016, respondent determined deficiencies of $6,417,493 and $230,772 in petitioners' 2008 and 2010 income tax liabilities, respectively, and accuracy-related penalties of $1,283,498.60 and $46,149.20 for those years, respectively, based on petitioners' substantial understatements of income tax. See secs. 6662(a), (b)(2). On December 5, 2017, we tried these consolidated cases, and the cases remain under consideration. On December 20, 2017, the Court issued its opinion in Graev v. Commissioner, 149 T.C. No. 23 (December 20, 2017) (Graev), and issues addressed in that opinion may affect our consideration of the accuracy-related penalties.

[1]Unless otherwise stated, all section references are to the Internal Revenue Code of 1986, as amended.

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Congress added section 6751 as part of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, sec. 3306, 112 Stat. 685, 744 (RRA 1998). That section is effective for penalty notices issued after December 31, 2000. RRA 1998 sec. 3306(c). Section 6751(b)(1) provides: "No penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate."

Graev sets forth the history of our interpretation of section 6751(b)(1). Suffice it to say that, after having earlier taken a contrary position, in Graev we held that the Commissioner's burden of production under section 7491(c) includes establishing compliance with the supervisory approval requirement of section 6751(b). Our report in Graev, published 15 days after the trial in this case, prompted the motion because one of the issues in these cases is whether petitioners are liable for section 6662 accuracy-related penalties.

Reopening the record for the submission of additional evidence lies within the Court's discretion. Nor-Cal Adjusters v. Commissioner, 503 F.2d 359, 363 (9th Cir. 1974), aff'g T.C. Memo. 1971-200; Butler v. Commissioner, 114 T.C. 276, 287 (2000). A court will not grant a motion to reopen the record unless, among other requirements, 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, at 287 (citations omitted).

By the motion, respondent seeks to reopen the record to receive into evidence the declaration of Laura Blado (declaration), Acting Group Manager for, among others, Revenue Agent Joan King, and two exhibits (exhibits), viz., two Civil Penalty Approval Forms, both referring to petitioners, one for tax year 2008

and the other for tax year 2010, and both apparently signed by Ms. Blado.[2] We set forth in the margin material particulars of the declaration.[3]

Discussion

Here, the proffered evidence would not be cumulative of any evidence currently in the record. Nor is the proffered evidence "impeaching" material. To the contrary, it is evidence that may provide proof that the requirements of section 6751(b)(1) have been satisfied; it is, thus, material to the penalty issue in these cases.

Evidence of the satisfaction of the requirements of section 6751(b)(1) would also likely change the outcome of these cases because, without the evidence, our holding in Graev would prevent us from sustaining the section 6662 penalties.

Moreover, it would for several reasons serve the interests of justice to reopen the record for the submission of evidence that respondent satisfied the requirements of section 6751(b)(1). First, trial of these cases were held prior to the issuance of our report in Graev. Second, petitioners never raised section 6751(b)

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[2]During a telephone conference with the parties on February 21, 2018, respondent asked that we make two corrections to the last paragraph of the motion. The first correction is to substitute the name "Laura Blado" for the name "Kimberly Stephens"; the second is to substitute the words "Exhibits 1 & 2" for the words "Exhibit 1", however, to be consistent with the exhibits in the record, the Court will substitute the words "Exhibits 96-R and 97-R" for the words "Exhibit 1". Those terms appear earlier in the motion, and respondent describes the errors in the last paragraph as mistakes made in drafting the motion. Also, petitioners have pointed out that the exhibits display a taxpayer identification number. We shall correct the motion and attachments accordingly.

[3]The declaration recites the following. On August 27, 2014, as part of her duties as the Acting Group Manager, Ms. Blado approved Revenue Agent Joan King's determination that a substantial understatement penalty should be imposed on petitioners for each year, 2008 and 2010. Ms. King had performed the examination of petitioners' income tax liabilities for taxable years 2008 and 2010 and had proposed a substantial understatement penalty under sec. 6662 in connection with her examination of each year. Ms. Blado approved the penalties on August 27, 2014, by electronically signing the respective form for each year. Ms. Blado has personal knowledge of the Internal Revenue Service's (IRS's) record keeping system, the attached exhibits are kept in the course of the IRS's regularly conducted business activity, and it is the IRS's regular practice to keep such records in the administrative file. The facts of the declaration are known to her to be true to the best of her knowledge and belief, and she is competent to testify to such facts and would be so testify if she appeared in court as a witness on the matter. She declares under penalty of perjury, that the declaration is true and correct.

as an issue prior to the closing of the record. Third, during a telephone conference call with the parties on February 21, 2018, to discuss, among other things, the motion, petitioner husband responded in the negative to the Court's questions as to whether he had witnesses he wished to call or had documents that he wished to introduce with respect to the issue of managerial approval of the penalty. Fourth, the Court has extended to April 23, 2018, the due dates for opening briefs, which gives petitioners adequate time to respond to respondent's argument that he has met his burden of production with respect to the penalties.

Petitioners object that the exhibits are "Unauthenticated & Undated". As to authenticity, respondent offers that the exhibits are certified domestic records of a regularly conducted activity that may be authenticated by the declaration of Ms. Blado. Respondent is correct. See rules 803(6) and 902(11), Federal Rules of Evidence. Petitioners have had notice of the motion and have had the opportunity to inspect the declaration and the exhibits. They offer nothing to show a lack of trustworthiness in the exhibits. The declaration appears to comply with the requirements of rule 902(11), Federal Rules of Evidence, and the exhibits appear to fall within the exception to the rule against hearsay for records of a regularly conducted business described in rule 803(6), Federal Rules of Evidence. We will, on that basis, admit the exhibits into evidence. We accept the declaration as authentic, but do not accept it into evidence for any purpose other than satisfying the certification requirements of rule 902(11), Federal Rule of Evidence. Petitioners may make other evidentiary objections or otherwise challenge the evidentiary weight of the declaration on brief.

For the reasons stated, it is

ORDERED that the Clerk of the Court is directed to file as respondent's amended motion a copy of respondent's motion to reopen the record (amended as described in this order). It is further

ORDERED that respondent's amended motion is granted to the extent described in this order, and the record is opened for receipt into evidence of the declaration and exhibits. It is further

ORDERED that the Clerk of the Court shall seal and remove from the Court's public record respondent's Motion to Reopen the Record, filed February 12, 2018, since it displays a taxpayer identification number, and it shall be retained by the Court in a sealed file which shall not be inspected by any person or entity except by an Order of the Court. It is further

ORDERED that the record is hereby closed.

(Signed) James S. Halpern
Judge

Dated: Washington, D.C.
March 5, 2018