Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided.

UNITED STATES TAX COURT
WASHINGTON, DC 20217

RANDY JENKINS, ET AL.,	)	
	)	
Petitioner(s),	)	**CZ**
	)	
v.	)	Docket No. 27139-11, 28712-11.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	
	)	
	)	
	)	
	)	
	)	

O R D E R

These cases were on the Court's September 22, 2014 trial calendar for Phoenix, Arizona. On January 26, 2018, the Commissioner moved to reopen the record to admit proof that he had complied with I.R.C. § 6751. Because the Gentrys didn't oppose the motion, we granted it as to the exhibits attached to the declaration of Tim Salsberry concerning Ira Gentry and Lynn Gentry. Mr. Gentry then filed a response almost two weeks later in which he objected to the Commissioner's motion, but that response is too little too late: Our Court looks to Rule 60(b) of the Federal Rules of Civil Procedure to determine whether we should reconsider an interlocutory order, and Mr. Gentry fails to provide a suitable reason that we should reconsider our prior order here.[1] *See Bedrosian v. Commissioner*, 144 T.C. 152, 156 (2015) (Rule 60(b) relief available for orders when there is:

[1] Mr. Gentry's response (1) takes issue with another prior order that granted the Commissioner's motion to amend his answer to conform his pleadings to the proof, (2) inexplicably denies the Commissioner's explanation of I.R.C. § 6751(b), (3) argues, without any citations, that the Commissioner is "procedurally barred" from reopening the case to correct any deficiency under I.R.C. § 6751(b), and (4) claims the District Court's criminal-forfeiture order was excessive. He notably does not argue that the Commissioner made a mistake when he said in his motion that the Gentrys did not object. There just isn't enough here for us to reconsider our order.

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mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence; fraud; or any other reason that justifies relief).

Mr. Jenkins opposed the Commissioner's motion from the beginning, so we are forced to hunt down yet another *Chai* ghoul, this one a very rare species.

Background

We begin with a timeline of Mr. Jenkins' case and the evolution of I.R.C. § 6751 jurisprudence:

- In the notice of deficiency that he issued in August 2011, the Commissioner determined that Mr. Jenkins was liable for fraudulent-failure-to-file penalties under I.R.C. § 6651(f).

- At the trial in October 2014, the Commissioner did not introduce evidence of his compliance with I.R.C. § 6751; the parties also never stipulated to his compliance.

- The parties finished briefing in November 2015.

- About one year later, we issued *Graev v. Commissioner* (*Graev II*), 147 T.C. ___, ___ (slip op. at 24-39) (Nov. 30, 2016), where we held that compliance with I.R.C. § 6751 is not ripe for review in a deficiency case because the penalty has not yet been "assessed".

- Only a few months passed before the Second Circuit held in *Chai v. Commissioner*, 851 F.3d 190, 218-23 (2d Cir. 2017), *aff'g in part, rev'g in part* 109 T.C.M. 1206, that we were wrong in *Graev II* and that the Commissioner had to show that he complied with I.R.C. § 6751 as part of his burdens of production and proof on penalties in deficiency cases.

- At the end of last year, we adopted the Second Circuit's holding in *Chai* as our own in *Graev v. Commissioner* (*Graev III*), 149 T.C. ___, (slip op. at 13-15) (Dec. 20, 2017).

- A little more than a month later the Commissioner filed the motion that we consider here.

The Commissioner wants to add to the record a penalty-approval form for the fraudulent-failure-to-file penalty that he determined against Mr. Jenkins in the notice of deficiency. In support of his motion, he submitted IRS supervisor Tim Salsberry's declaration to authenticate the form and show how Mr. Salsberry came to approve his subordinate's penalty determination. Mr. Salsberry signed the penalty-approval form in May 2011, and the form itself lists Almiria Garcia as the examiner. Mr. Salsberry says in his declaration that he was Ms. Garcia's immediate supervisor, and that he signed the form to approve Ms. Garcia's determination of the I.R.C. § 6651(f) penalty.

Should we reopen the record to let this penalty-approval form in? Mr. Jenkins objects to the Commissioner's motion, but he hasn't told us why.[2]

Analysis

The decision to reopen the record to admit additional evidence is within our discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971); *see also Nor-Cal Adjusters v. Commissioner*, 503 F.2d 359, 363 (9th Cir. 1974) (the Ninth Circuit doesn't review our discretion "except upon a demonstration of extraordinary circumstances which reveal a clear abuse of discretion") (citing *Friednash v. Commissioner*, 209 F.2d 601 (9th Cir. 1954); *Chiquita Mining Co. v. Commissioner*, 148 F.2d 306 (9th Cir. 1945)), *aff'g* 30 T.C.M. 837 (1971).

But our discretion is not unbounded. 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

[2] Respondent noted Mr. Jenkins's objection in the motion. We ordered Mr. Jenkins to file any response to the Commissioner's motion on or before February 22, 2018. He never did.

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 SEC v. Rogers*, 790 F.2d 1450, 1460 (9th Cir. 1986) (trial court "should take into account, in considering a motion to hold open the trial record, the character of the additional [evidence] and the effect of granting the motion"), *overruled on other grounds by Pinter v. Dahl*, 486 U.S. 622 (1988). And before we grant a motion to reopen the record, we also weigh the Commissioner's diligence (or lack thereof) against any possible prejudice to the taxpayer. *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. Commissioner*, 59 T.C.M. 321 (1990)).

Would the penalty-approval form change the outcome of Mr. Jenkins' case? The Commissioner determined a fraudulent-failure-to-file penalty against Mr. Jenkins under I.R.C. § 6651(f), and he wants to add the penalty-approval form to the record to show that he complied with I.R.C. § 6751(b)(1) when that penalty was initially determined. But I.R.C. § 6751(b)(2) says that the supervisory-approval requirement "shall not apply to * * * any addition to tax under section 6651." We can see how that section might be interpreted as an exception for only those penalties under I.R.C. § 6651 that are "automatically calculated through electronic means" -- which we don't think includes the *fraudulent*-failure-to-file penalty under I.R.C. § 6651(f). Indeed, the exception is part of a list in I.R.C. § 6751(b)(2) that concludes: "or * * * any other penalty automatically calculated through electronic means." And the IRS seems to interpret the section that way. *See, e.g.*, Internal Revenue Manual (IRM) pt. 20.1.1.2.3(2) (Nov. 21, 2017) ("[n]otwithstanding the exception [in I.R.C. § 6751(b)(2)], th[e] approval requirement will also apply to the imposition of any fraud penalty including the fraudulent failure to file penalty under IRC 6651(f)"); IRM pt. 20.1.8.1, Exception (Aug. 16, 2011) ("[a]dditions to tax under IRC 6651 (excluding IRC 6651(f)), * * * or any other penalty automatically calculated through 'electronic means' do not require written managerial approval"); IRM pt. 4.23.9.4(2) (Mar. 27, 2017) ("[d]espite the fact that IRC 6651 penalties are exempted by statute from the managerial approval requirement, the fraudulent failure to file penalty requires approval from both Counsel and the manager"). But there is no room for statutory interpretation here; this issue has already been decided by our Court.

In a case decided two months before *Graev III*, we held without reservation that I.R.C. § 6751(b)'s supervisory-approval requirement doesn't apply to any penalties under I.R.C. § 6651, including the fraudulent-failure-to-file penalty of

I.R.C. § 6651(f). *Beam v. Commissioner*, T.C. Memo. 2017-200, at *14 (citing I.R.C. § 6751(b)(2)(A), as well as a Tax Court case that distinguished the fraudulent-failure-to-file penalty from the civil-fraud penalty). One might wonder whether that reading of I.R.C. § 6751(b)(2)(A) frustrates the purpose of I.R.C. § 6751(b)(1). We can certainly imagine a scenario where the 75% maximum penalty of I.R.C. § 6651(f) might be used as a bargaining chip to extract a taxpayer concession -- most taxpayers likely favor the 25% maximum penalty under I.R.C. § 6651(a) or, even better, no penalty at all. But the plain language of I.R.C. § 6751 is what it is, we have an opinion on point, and we will follow it here.

Under I.R.C. § 6751(b)(2)(A) and *Beam*, the Commissioner is not required to show compliance with I.R.C. § 6751(b)(1) for penalties determined under I.R.C. § 6651(f). Because the Commissioner doesn't have to show compliance with I.R.C. § 6751(b)(1) for the penalty that he determined against Mr. Jenkins, the penalty-approval form that he seeks to admit here would not change the outcome of the case. It is therefore

ORDERED that respondent's January 26, 2018 motion to reopen the record is denied as to the exhibits attached to the declaration of Tim Salsberry concerning Mr. Jenkins. It is also

ORDERED that Mr. Gentry's February 12, 2018 opposition to motion to reopen the record shall be retitled as his motion for reconsideration of the Court's January 31, 2018 order. It is also

ORDERED that Mr. Gentry's motion for reconsideration of the Court's January 31, 2018 order is denied.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
March 9, 2018