UNITED STATES TAX COURT
WASHINGTON, DC 20217 **DRC**

DANIEL E. LARKIN & CHRISTINE L. LARKIN,	)	
Petitioners,	)	
v.	)	Docket No. 6345-14.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

Now before the Court is respondent's motion to reopen the trial record to allow the submission of evidence of compliance by the Internal Revenue Service ("IRS") with section 6751(b)(1) in connection with the accuracy-related penalties at issue in this case. We will grant the motion; but in order to mitigate any possible prejudice to petitioners, we will hold a supplemental trial session (rather than simply adding respondent's new evidence to the existing trial record) and will thereafter allow the parties to file an additional brief on the subject of respondent's compliance (or non-compliance) with section 6751(b)(1).

Background

Petitioners filed their petition in this case on March 19, 2014, challenging a notice of deficiency issued by the IRS as to petitioners' taxable years 2008, 2009, and 2010. For each year the IRS determined a deficiency of tax, an addition to tax under section 6651(a)(1), and an accuracy-related penalty under section 6662(a).

Continuances and trial

This case was originally set for trial on January 5, 2015, but was continued at petitioners' request (to which respondent did not object). The case was then set for trial on June 1, 2015, but was again continued at petitioners' request (to which respondent did not object). The case was then tried in Chicago, Illinois, on

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October 20, 2015. At the conclusion of trial, petitioners moved for leave to supplement the record with additional exhibits within 45 days. (ECF 25 at 9-10, 125-131.) The Court denied the motion (id. at 131-133)--but without prejudice, and with implicit encouragement to respondent to consider cooperating with supplemental stipulations in light of any additional exhibits that petitioners might later proffer. (See id. at 135.)

Petitioners' post-trial supplementation of the record

More than a month thereafter, on December 2, 2015, petitioners filed a motion to supplement the record with new exhibits not offered at trial; and on December 10, 2015, the Court held a conference call with counsel for both parties. Thereafter the parties by agreement submitted a stipulation of settled issues on June 6, 2016, and a first supplemental stipulation of facts (including six of petitioners' late-offered exhibits) on July 27, 2016, which the Court permitted to be filed. The two stipulations together rendered moot petitioner's motion to supplement the record.

On August 3, 2016--more than 9 months after trial--petitioners filed a second motion to supplement the record with seven additional exhibits. The parties thereafter submitted a second supplemental stipulation of facts on August 18, 2016, which included two of petitioners' proffered documents (combined as new Exhibit 23-J). As to the other five documents, the Court sustained respondent's objection to the motion to supplement the record. (ECF 51.) (Thereafter, in the course of the parties' filing post-trial briefs, petitioners have filed a third motion to supplement the record on April 28, 2017. Respondent has objected, and that motion remains pending and will not be addressed in this order.)

Graev II and post-trial briefs

On November 30, 2016, this Court issued its opinion in Graev v. Commissioner, 147 T. C. No. 16 (Nov. 30, 2016) (Graev II), holding that the question of whether the requisite supervisory approval of an initial determination of a penalty had been obtained pursuant to section 6751(b)(1) was premature in a deficiency case, because the penalty had not yet been assessed, and holding that supervisory approval of a penalty determination is not properly an issue in a pre-assessment deficiency case.

The latest post-trial submission in this case was filed May 22, 2017. Consistent with Graev II, none of the parties' post-trial submissions in this case had addressed section 6751(b)(1).

Graev III and respondent's motion to reopen

However, about seventeen months after the trial in this case, the U.S. Court of Appeals for the Second Circuit had issued its opinion in Chai v. Commissioner, 851 F.3d 190, 221 (2nd Cir. March 20, 2017), in which it held--

> that § 6751(b)(1) requires written approval of the initial penalty determination no later than the date the IRS issues the notice of deficiency (or files an answer or amended answer) asserting such penalty.
>
> In that vein, we further hold that compliance with § 6751(b) is part of the Commissioner's burden of production and proof in a deficiency case in which a penalty is asserted.

Nine months later, this Court held to the same effect, as to the burden of production, in Graev v. Commissioner, 149 T.C. No. 23 (Dec. 20, 2017) (Graev III), overruling our prior contrary holding in Graev II.

By order of February 8, 2018, we raised sua sponte the issue of section 6751(b)(1) and ordered the parties to make submissions "addressing the effect of section 6751(b) on this case and directing the Court to any evidence in the record of this case that shows the supervisory approval required by section 6751(b)."

On February 22, 2018, respondent filed a motion to reopen the record, with which he submitted a "Civil Penalty Approval Form" (authenticated by a declaration of the examiner who prepared the form for approval), which he asserts shows compliance with section 6751(b)(1). In a "Motion for Leave ..." filed March 2, 2018, petitioners argued that we should decide this issue on the current record. The Court held a telephone conference with counsel for the parties on March 9, 2018, during which petitioners objected to respondent's motion to reopen the record on the grounds that (1) the motion comes too late, (2) granting the motion would deprive petitioners of the chance to cross-examine the witnesses on whom respondent would rely for this issue, and (3) granting the motion would deprive petitioners of the opportunity to include this issue in their (already concluded) briefing of the case.

Discussion

Reopening the record for the submission of additional evidence is a matter within the discretion of the trial court. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 331 (1971); Butler v. Commissioner, 114 T.C. 276, 286-287 (2000). In the circumstances of this case, we will exercise our discretion and allow the record to be reopened.

In a case like this one--i.e., tried before this Court's opinion in Graev II held that section 6751(b)(1) is not properly an issue in a pre-assessment deficiency case (which holding we overruled in Graev III)--respondent's failure to submit evidence of supervisory approval of the penalty is arguably attributable only to respondent's own oversight and not to any action by this Court or the petitioners. For that reason, the Court might sometimes (depending on other relevant facts) permissibly exercise its discretion in such a case by denying a motion to reopen the record filed after Graev III.

However, this is a case in which great latitude as to supplementing the trial record has been granted to petitioners. They have been twice allowed to supplement the trial record with additional evidence--and that, after having requested and having received two continuances of trial. In such a case, it seems inappropriate now to discover a new rigor that will be enforced only against respondent. Rather, in this circumstance we think that an even-handed approach is best obtained by allowing respondent to submit additional evidence.

However, we acknowledge petitioners' desire to be allowed to cross-examine respondent's witness(es). For example, section 6751(b)(1) requires approval by the determining individual's "immediate supervisor", whereas the "Civil Penalty Approval Form" that respondent proffers bears a signature by a "Group Manager", who might or (for all we can tell) might not be the immediate supervisor of the examiner who made the initial determination. Therefore, we will hold a supplemental trial session, at which petitioners will be able to explore this issue (unless it is resolved to their satisfaction before that session). We also acknowledge petitioners' reasonable request to brief this issue; and at the conclusion of the session, we will set a schedule for doing so. In the telephone conference held March 9, 2018, the Court encouraged the parties to promptly disclose their evidence on this issue, with a view toward stipulating the relevant facts to the extent possible and, if possible, rendering the supplemental trial session unnecessary.

It is

ORDERED that respondent's motion to reopen the record filed February 22, 2018, is granted for the limited purpose of allowing the parties to submit evidence with respect to the IRS's compliance with the requirements of section 6751(b) in determining the section 6662(a) penalty against petitioners for tax years 2008, 2009, and 2010. It is further

ORDERED that this case is calendared for further trial at a Special Session of the Tax Court beginning at 2:00 p.m., on Monday, March 26, 2018, in Room 3908, of the Kluczynski Federal Building, 230 S. Dearborn Street, Chicago, Illinois 60604. The Court expects to conclude the further trial on that same date.

This order constitutes official notice of the same to the parties.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
March 14, 2018