UNITED STATES TAX COURT
WASHINGTON, DC 20217

DARRELL ARCHER, ET AL.,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 10444-16, 12414-16.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

These consolidated cases were tried in San Francisco, California, on September 18, 2017. The issues submitted to the Court involved petitioner's entitlement to certain Schedule C business expense deductions and Schedule A charitable deductions and his liability for accuracy-related penalties under Internal Revenue Code section 6662(a) for 2013 and 2014. (All section references are to the Internal Revenue Code in effect for the years in issue.) The evidence at trial established petitioner's failure to maintain adequate records substantiating most, if not all, of the deductions in dispute. Certain of the items claimed appeared to be personal rather than ordinary and necessary business expenses. The Court ordered seriatim briefs directing respondent to specify the defects in petitioner's exhibits offered as substantiation. Petitioner was allowed to file an answering brief. However, the Court advised petitioner on the record that some of his evidence failed to comply with sections 274(d) with respect to travel expenses and section 170(f)(8) with respect to charitable contributions.

Respondent's brief was filed November 29, 2017. After an extension of time requested by him, petitioner's brief was filed February 12, 2018. On February 13, 2018, the Court ordered respondent to file a reply brief addressing the Court's December 20, 2017, opinion in Graev v. Commissioner, 149 T.C. No. 23, and to file any appropriate motion. On March 16, 2018, respondent filed a motion to reopen the record in each case for receipt of records showing supervisory approval of the substantial understatement and negligence grounds of section 6662(a). Each motion was accompanied by a declaration of the examining agent authenticating the business record status of the supervisory approval form attached.

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Petitioner's responses to the motions to reopen the record, in which he objected on various grounds, were filed April 5, 2018. Petitioner erroneously argues that the supervisor approval for 2013 on September 18, 2015, occurred after the notice of deficiency. However, the notice of deficiency for 2013 that is the foundation of docket No. 10444-16 was sent February 2, 2016 (Stipulated Exhibit 2J), and the petition received by the Court on May 3, 2016, would be untimely if the notice had been sent on August 20, 2015.

Petitioner's responses make various other meritless arguments about the validity of the notices of deficiency. We will disregard them for present purposes but note that he is apparently misguided in his citation of legal authorities in the context of his acknowledged ignorance of sections 274(a) and 170(f)(8). With respect to relevant considerations, he suggests that motions made after the record is closed are untimely and that receipt of the evidence probably would not change the outcome of these cases. He is mistaken in the latter regard because our view of the evidence supports the application of section 6662(a) penalties.

Section 6751(b)(1) provides that "[n]o penalty 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." A majority of this Court held in Graev v. Commissioner, 147 T.C. __ (Nov. 20, 2016) (Graev II), that the question of whether a penalty was properly approved under section 6751(b) was premature in a deficiency case, because the penalty was not yet assessed. On March 20, 2017, the Court of Appeals for the Second Circuit issued its opinion in Chai v. Commissioner, 851 F.3d 190 (2d Cir. 2017) (Chai), in which it disagreed with the majority's analysis in Graev II. The Court of Appeals for the Second Circuit held in Chai, 851 F.3d at 221, that section 6751(b) "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." When Chai was issued, a final decision in Graev v. Commissioner, docket No. 30638-08, the case to which Graev II related, had not yet been entered.

As of the time of trial of this case and respondent's opening brief, this Court's position regarding compliance with section 6751(b) continued to be the position held by the majority in Graev II. On December 20, 2017, we issued Graev v. Commissioner, 149 T.C. __ (Dec. 20, 2017) (Graev III), supplementing and overruling in part Graev II. In Graev III, 149 T.C. at __ (slip op. at 14), we held, consistent with the analysis of the Court of Appeals for the Second Circuit in Chai,

that the Commissioner's burden of production under section 7491(c) includes establishing compliance with the supervisory approval requirement of section 6751(b).

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, 286-287 (2000). We will grant a motion to reopen the record only 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 some aspect of the outcome of the case. Butler v. Commissioner, 114 T.C. at 287.

The evidence that is the subject of respondent's motions would not be cumulative of any evidence in the record, and it would not be impeaching material. Respondent bears the burden of production with respect to penalties and would offer the evidence as proof that the requirements of section 6751(b)(1) have been met. As indicated above, we believe that receipt of the evidence would change the result in these cases.

Petitioner requests the right to examine the examiner who executed the declarations accompanying respondent's motions, which we interpret as a hearsay objection to certain representations therein. We will allow limited discovery to propound the questions that petitioner wishes to pursue. In view of his propensity for misguided and meritless arguments, we will limit that discovery to proper areas of inquiry. Upon due consideration and for cause, it is hereby

ORDERED that on or before May 4, 2018, petitioner may serve on respondent interrogatories consistent with Rule 71, Tax Court Rules of Practice and Procedure, which will be single, definite questions (see Pleier v. Commissioner, 92 T.C. 499 (1989)) directed at the contents of the Declarations of Edmundo Del Castillo supporting respondent's motions to reopen the record filed March 16, 2018. It is further

ORDERED that on or before June 4, 2018, respondent shall serve on petitioner answers to interrogatories served by petitioner and shall file with the Court a report attaching the interrogatories and answers thereto or otherwise indicating the then current status of these cases.

(Signed) Mary Ann Cohen
Judge

Dated: Washington, D.C.
April 13, 2018