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UNITED STATES TAX COURT
WASHINGTON, DC 20217

NIKTA FATEMEH ABDOLRAHIM & MELVIN COLLINS,	)	
Petitioners,	)	
v.	)	Docket No. 9650-14.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

O R D E R

On January 19, 2018, respondent filed a Motion to Reopen the Record pursuant to Rule 50 of the Tax Court Rules of Practice and Procedure. Respondent moves that the Court reopen the record to allow the admission of evidence necessary to establish that he has met the requirements of section 6751(b)(1) in determining section 6663 penalties with respect to petitioner Melvin Collins' 2009 and 2010 Federal income tax liabilities.[1] The Court ordered petitioners to file a response to respondent's motion, which petitioners did on February 5, 2018. As explained below, we will grant respondent's motion.

Background

By statutory notice of deficiency dated January 23, 2014, respondent determined deficiencies of $11,625 and $19,083 in petitioners' Federal income tax for the 2009 and 2010 taxable years, respectively. In this same notice of deficiency, respondent also determined additions to tax pursuant to section 6651(a)(1) of $2,459.25 and $4,275.75, and fraud penalties pursuant to section

[1]Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the years at issue.

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6663 of $8,718.75 and $14,312.25 applicable only to Mr. Collins, for the 2009 and 2010 taxable years, respectively.[2]

On December 1, 2015, we tried this case,[3] and it remains under consideration. On December 20, 2017, the Court issued its Opinion in Graev v. Commissioner, 149 T.C. No. 23 (Dec. 20, 2017) (Graev III), and issues addressed in Graev III may affect our consideration of the fraud penalties.

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. This provision applies to notices issued after December 31, 2000. Id., 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."

In Graev III, we set forth the history of our interpretation of section 6751(b)(1). After having earlier taken a contrary position, in Graev III 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)(1). Graev III prompted us (by Order dated December 26, 2017) to set a limited time for the parties in the instant case to make any motions they deem appropriate in the light of Graev III. Our December 26, 2017, Order in turn

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[2]In the notice of deficiency, respondent also determined in the alternative that petitioners' underpayments of tax for 2009 and 2010 were due to negligence or disregard of rules and regulations or to their substantial understatements of income tax pursuant to sec. 6662. In a January 9, 2018, filing with the Court, respondent conceded these accuracy-related penalties.

[3]By Order dated November 25, 2015, the Court consolidated this case for purposes of trial, briefing, and decision with Collins v. Commissioner, Docket No. 9649-14, involving Mr. Collins' Federal income tax liabilities for the 2011 and 2012 taxable years. In that case, respondent has asserted only additions to tax under secs. 6651 and 6654 and thus the implications of sec. 6751(b)(1) are not at issue. See sec. 6751(b)(2)(A). Another related case, Abdolrahim v. Commissioner, Docket No. 9648-14, involving petitioner Nikta Fatemeh Abdolrahim's Federal income tax liabilities for the 2011 and 2012 taxable years, was resolved by stipulated decision entered on November 16, 2015.

prompted respondent's motion to reopen the record because one of the issues in this case is whether petitioner Mr. Collins is liable for section 6663 penalties for 2009 and 2010 and there is no evidence presently in the record relating respondent's compliance with the section 6751(b)(1) supervisory approval requirement (and neither party raised the issue of section 6751(b)(1) until prompted by the Court's December 26, 2017, Order).

In his motion, respondent seeks to reopen the record to submit into evidence (1) the declaration of Revenue Agent David M. Ledoux, who conducted the examination of petitioners' 2009 and 2010 Federal income tax returns and testified on behalf of respondent at trial and (2) one exhibit (attached to the declaration), viz., a Civil Penalty Approval Form referencing petitioners' 2009 and 2010 taxable years and apparently signed by Paul E. Adamonis, who, according to the declaration, was Mr. Ledoux's immediate supervisor on October 21, 2013, the date on which Mr. Adamonis signed the form.[4] Petitioners object to the granting of respondent's motion on grounds of fairness in that respondent could have submitted such evidence at trial but did not do so. They also contend that they will suffer severe prejudice should the Court reopen the record and admit respondent's proffered evidence because they will have no opportunity to counter or rebut respondent's evidence; according to petitioners, due process requires that they be afforded an opportunity to confront and rebut the evidence. Petitioners did not

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[4]The declaration recites the following. In connection with his examination of petitioners' Federal income tax liabilities for 2009 and 2010, Mr. Ledoux proposed the imposition of sec. 6663 fraud penalties against Mr. Collins only, as well as sec. 6651(a)(1) additions to tax against both Mr. Collins and Ms. Adbolrahim. Mr. Ledoux prepared the attached Civil Penalty Approval Form indicating inter alia the assertion of these penalties and forwarded the form to Mr. Adamonis for approval. Mr. Adamonis approved these penalties on October 21, 2013, signing the form by hand. Mr. Ledoux is personally familiar with Mr. Adamonis' signature, has personal knowledge of the Internal Revenue Service's (IRS') recordkeeping system, the form was taken from the IRS' administrative file for petitioners and was kept in the course of the IRS' regularly conducted activity, and it is the IRS' regular practice to keep such records in the administrative file. The facts asserted in the declaration are known to Mr. Ledoux to be true to the best of his knowledge and belief, and he is competent to testify to such facts and would so testify if he appeared in court as a witness on the matter. Mr. Ledoux declares under penalties of perjury under the law of the United States of America that the declaration is true and correct.

specify in their written objection to respondent's motion what rebuttal evidence they would like to proffer.

On April 3, 2018, the Court held a telephone conference with the parties to discuss respondent's motion. During the call, Mr. Collins reiterated petitioners' general belief that reopening the record now and admitting respondent's proffered evidence would be prejudicial and unfair. He seemed only to question the authenticity of the Civil Penalty Approval Form, stating that he thought the form was recently signed and that there were undated handwritten notations on it. The form, however, clearly shows that it was signed on October 21, 2013, several months before the January 23, 2014, notice of deficiency was issued to petitioners, and the handwritten notations (which are below the signature and date line of the form) confirm the assertion of the section 6663 penalties and the section 6651 additions to tax for 2009 and 2010. Similar to their written objection, at no point during the call did petitioners identify any particular testimony they would wish to elicit from either Mr. Ledoux or Mr. Adamonis, or suggest any other additional evidence they would like to proffer.

Discussion

Reopening the record for the submission of additional evidence lies within the Court's discretion. Zenith Radio Corp. v. Hazeltine Research Inc., 401 U.S. 321, 331 (1971); 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). We 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 issue(s) involved, and the evidence would probably change the outcome of the case. Butler v. Commissioner, 114 T.C. at 287 (citations omitted).

Because neither party addressed the supervisory approval requirement under section 6751(b)(1) in this case at trial or on brief, respondent's proffered evidence would not be cumulative of or impeach any evidence already in the record. To the contrary, it is evidence that may show that the requirements of section 6751(b)(1) have been satisfied; thus it is material to the section 6663 penalty issues in this case. Such evidence would also likely change the outcome of this case because, without the evidence, our holding in Graev III would prevent us from sustaining the section 6663 penalties.

Moreover, we see several reasons why it would 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 was held and briefing was completed in this case before the issuance of our Opinion in Graev III. Second, petitioners never raised section 6751(b)(1) as an issue at any point during the proceedings before the issuance of our Opinion in Graev III. Third, petitioners have had adequate notice of respondent's motion and have had the opportunity to inspect respondent's proffered evidence, lodge their evidentiary objections, and offer other evidence regarding section 6751(b)(1). Indeed, during the telephone conference with the parties on April 3, 2018, upon the Court's inquiry, petitioners could not say whether they had witnesses they wished to call or had documents they wished to proffer with respect to the issue of section 6751(b)(1) supervisory approval of the section 6663 penalties. Accordingly, we will order that the record be reopened.

Having found that it is appropriate to reopen the record, we must still decide whether respondent's proffered evidence is in fact admissible. Petitioners seemingly only question whether the Civil Penalty Approval Form is authentic. However, both documents are inadmissable hearsay absent the application of some exception. See Fed. R. Evid. 801 and 802. Regarding the Civil Penalty Approval Form, it is apparent by his motion that respondent's position is that the Civil Penalty Approval Form should be admitted as evidence of section 6751(b)(1) supervisory approval of the section 6663 penalties under the exception to the rule against hearsay for records of a regularly conducted business described in rule 803(6) of the Federal Rules of Evidence, and that the declaration of Mr. Ledoux was prepared to satisfy the requirements of rule 902(11) of the Federal Rules of Evidence (i.e., to authenticate the form). See Clough v. Commissioner, 119 T.C. 183, 188-191 (2002). We agree with respondent. As noted, petitioners have had time to review both documents, yet they have offered nothing to show that either document is unreliable. Indeed, Mr. Ledoux testified at trial, which provided petitioners the opportunity to assess and challenge his credibility. Petitioners have not raised any specific challenge to Mr. Ledoux's or the declaration's trustworthiness. It appears to the Court that the declaration complies with the requirements of rule 902(11) of the Federal Rules of Evidence, and thus the Civil Penalty Approval Form, supported by this authentic declaration, falls within rule 803(6) of the Federal Rules of Evidence as a record kept by the IRS in the course

of its regularly conducted activity.[5] Accordingly, we shall admit the Civil Penalty Approval Form into evidence.

We also believe that the declaration is admissible evidence not just for the purpose of satisfying the certification requirements of rule 902(11) of the Federal Rules of Evidence. Although it does not appear to the Court that the declaration falls under a specific exception to the rule against hearsay under rule 803 of the Federal Rules of Evidence (and respondent in his motion makes no specific assertion that it does),[6] given the circumstances of this case the declaration is separately admissible under the residual exception to the rule against hearsay.[7] See Fed. R. Evid. 807. Accordingly, we shall admit the declaration of Mr. Ledoux into evidence and not limit its admission to just rule 902(11) purposes.

Premises considered, it is hereby

ORDERED that respondent's Motion to Reopen the Record, filed January 19, 2018, is granted and the record is reopened. It is further

ORDERED that the declaration and exhibit attached to respondent's motion are admitted into evidence as Exhibits 33-R and 34-R, respectively. It is further

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[5]Petitioners do not contend that respondent failed to comply with the final sentence of Fed. R. Evid. 902(11), which requires the proponent to give an adverse party "reasonable written notice" before the trial or hearing "of the intent to offer the record–and must make the record and certification available for inspection–so that the party has a fair opportunity to challenge them." Although respondent did not give petitioners notice before trial, given the circumstances of this case and as we have noted, respondent's lodging of the declaration contemporaneously with filing his motion has given petitioners adequate notice and opportunity to inspect the declaration, lodge their objections, and offer other evidence.

[6]The declaration does not fall within the same hearsay exception as the Civil Penalty Approval Form because it was not prepared contemporaneously (Mr. Ledoux's signature on the declaration is dated January 12, 2018).

[7]Petitioners also do not contend that respondent failed to comply with rule 807(b) of the Federal Rules of Evidence, which sets forth a similar notice requirement as the last sentence of rule 902(11) of the Federal Rules of Evidence. See supra note 5.

ORDERED that the record is closed.

(Signed) Tamara W. Ashford
Judge

Dated: Washington, D.C.
April 25, 2018