

UNITED STATES TAX COURT
WASHINGTON, DC 20217

PLENTYWOOD DRUG, INC., ET AL.,)
) **SR**
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 Petitioner(s),)
)
 v.) Docket No. 17753-16, 17754-16,
) 17755-16.
 COMMISSIONER OF INTERNAL REVENUE,)
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 Respondent)
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ORDER

These consolidated cases were tried in St. Paul, Minnesota in September of last year, and the parties finished briefing in March 2018. The Commissioner moved in April 2018 to reopen the record to admit penalty-approval forms that he says show he complied with I.R.C. § 6751(b)(1) for the accuracy-related penalties that he determined against petitioners. He also said that “[p]etitioners’ counsel’s position on th[e] motion is that the issue is moot because petitioners have already conceded the validity of penalties to the extent there is a deficiency.”

We reviewed the record in these cases and found that the individual petitioners did in fact dispute the penalties in their petitions, which is important because the Commissioner has the burden of production for showing that he complied with § 6751 in determining penalties against individual petitioners.¹ *See Graev v. Commissioner*, 149 T.C. ___, ___ (slip op. at 13-15) (Dec. 20, 2017)

¹ There’s also a corporate petitioner here, but the Commissioner doesn’t have the burden of production for showing § 6751 compliance for penalties he determined against corporate petitioners. *See Dynamo Holdings Ltd. P’ship v. Commissioner*, 150 T.C. ___, ___ (slip op. at 13) (May 7, 2018) (citing *NT, Inc. v. Commissioner*, 126 T.C. 191, 195 (2006)).

(citing *Chai v. Commissioner*, 851 F.3d 190, 221 (2d Cir. 2017), *aff'g in part, rev'g in part* 109 T.C.M. 1206), *supplementing* 147 T.C. 460 (2016); *see also Wheeler v. Commissioner*, 127 T.C. 200, 206-07 (2006), *aff'd*, 521 F.3d 1289 (10th Cir. 2008). We therefore issued an order in which we asked petitioners to clarify their position on the Commissioner's motion. Petitioners recently filed their response: They say that they already conceded penalties on some issues but that they did not want to concede penalties on others. What petitioners fail to do, however, is object to the Commissioner's motion or give us a single reason why we shouldn't grant it.

We won't grant the Commissioner's motion with regard to the penalties that he determined against the corporate petitioner because it wouldn't change the outcome of that case. *See Butler v. Commissioner*, 114 T.C. 276, 287 (2000), *abrogated on other grounds by Porter v. Commissioner*, 132 T.C. 203 (2009). But we will grant it with regard to the penalties that he determined against the individual petitioners because they haven't raised any objections, despite being given more than one opportunity to do so.

It is therefore

ORDERED that respondent's April 24, 2018 motion to reopen the record is denied to the extent it seeks the admission of the penalty-approval form and attachments for the penalties determined against Plentywood Drug Inc. It is also

ORDERED that respondent's April 24, 2018 motion to reopen the record is granted to the extent it seeks the admission of the penalty-approval forms and attachments for the penalties determined against the Eberlings and the Manns.

**(Signed) Mark V. Holmes
Judge**

Dated: Washington, D.C.
July 11, 2018