 CLC

UNITED STATES TAX COURT
WASHINGTON, DC 20217

MICHAEL E. BROWN & MIRIAM L. MERCADO-BROWN,	)	
Petitioner(s),	)	
v.	)	Docket No. 21096-15.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

Respondent moved to reopen the record (motion) to submit evidence to establish he satisfied the section 6751(b)(1) requirements for imposing section 6662(a) penalties for the tax years 2012 and 2013.[1] We ordered petitioners to respond to the motion by June 11, 2018. Although petitioners did not file a response, reopening the record for the submission of additional evidence lies within the discretion of the Court, and we will grant the motion.

On April 11, 2017, we tried this case and the case remains under consideration. On December 20, 2017, the Court issued its opinion in Graev v. Commissioner, 149 T.C. ___ (Dec. 20, 2017) (Graev), and issues addressed in that opinion may affect our consideration of the section 6662(a) 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. at 744 (RRA). That section is effective for penalty notices issued after December 31, 2000. RRA 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

[1]Unless otherwise stated, all section references are to the Internal Revenue Code of 1986, as amended.

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making such determination or such higher level official as the Secretary may designate."

Graev sets forth the history of our interpretation of section 6751(b)(1). Suffice it to say that, after having earlier taken a contrary position, in Graev 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). Our report in Graev, some eight months after the trial in this case, prompted the motion because one of the issues in this case is whether petitioners are liable for section 6662(a) penalties.

Reopening the record for the submission of additional evidence lies within the Court's discretion. Butler v. Commissioner, 114 T.C. 276, 287 (2000). A court 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 issues involved, and the evidence probably would change the outcome of the case. Id.

By the motion, respondent seeks to reopen the record to receive into evidence (1) the declaration of Jennifer Earls (exhibit 7-R), Supervisory Tax Specialist and the immediate supervisor of Tax Compliance Officer Janice Moore, and (2) a Civil Penalty Approval Form (exhibit 8-R), signed by Ms. Earls. We set forth in the margin material particulars of the declaration.[2]

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[2]In pertinent part, exhibit 7-R recites the following: On November 4, 2014, as part of her duties as a Supervisory Tax Specialist, Ms. Earls was the immediate supervisor of Ms. Moore. Ms. Moore examined the petitioners' individual income tax returns for the tax years 2012 and 2013 and proposed a penalty under section 6662(a) in connection with her examination of each year. Ms. Earls approved the penalties on November 4, 2014, by signing the Civil Penalty Approval Form. Ms. Earls has personal knowledge of the Internal Revenue Service's (IRS) record keeping system. The Civil Penalty Approval Form was taken from the IRS administrative file kept for the petitioners' 2012 and 2013 individual tax years. Such record is kept in the course of regularly conducted activity and it is regular practice to keep such record. Ms. Earls knows the facts of the declaration are true to the best of her knowledge and belief, and she is competent to testify to such facts and would so testify if she appeared in court as a witness on the matter. Under penalty of perjury, she has declared the declaration to be true and correct.

Here, the proffered evidence is not cumulative of any evidence currently in the record. It is also not "impeaching" material. To the contrary, it is evidence that may provide proof that the requirements of section 6751(b)(1) have been satisfied; it is, thus, material to the penalty issues in this case.

Moreover, evidence that the requirements of section 6751(b)(1) have been satisfied would also likely change the outcome of the case because, without the evidence, our holding in Graev would prevent us from sustaining the section 6662(a) penalties.

Finally, reopening the record to receive evidence of supervisory approval of the penalties would serve the interests of justice for at least two reasons. First, the trial of this case was held prior to the issuance of our report in Graev. Second, petitioners did not raise the issue of compliance with section 6751(b)(1) prior to the closing of the record.

For the reasons stated, it is

ORDERED that the motion is granted and we will receive into evidence the declaration (exhibit 7-R) and the Civil Penalty Approval Form (exhibit 8-R). It is further

ORDERED that the record in this case is closed.

(Signed) James S. Halpern
Judge

Dated: Washington, D.C.
July 17, 2018