UNITED STATES TAX COURT
WASHINGTON, DC 20217

PA

GEORGE FAKIRIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 18292-12.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

ORDER

Respondent moves, pursuant to Rule 50,[1] that the Court reopen the record for the purpose of allowing him to submit evidence to establish that he satisfied the requirements of section 6751(b)(1) in determining section 6662 accuracy-related penalties with respect to petitioner's Federal income tax for the 2006, 2007, and 2008 taxable years.[2] Petitioner objects. We will grant respondent's motion in part, and deny it in part, as set forth below.

Background

In a notice of deficiency dated April 17, 2012, respondent determined deficiencies of $129,732, $167,680, and $32,449, for 2006, 2007, and 2008,

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[1]Unless otherwise noted, all Rule references are to the Tax Court Rules of Practice and Procedure, and all section references are to the Internal Revenue Code of 1986, as amended and in effect for the years at issue.

[2]On June 28, 2017, the Court issued its Memorandum Opinion (T.C. Memo. 2017-126) in this case, and on that same date entered a decision for respondent. On July 24, 2017, respondent filed a Motion to Vacate or Revise Pursuant to Rule 162 and a Motion for Reconsideration of Findings or Opinion Pursuant to Rule 161. On September 25, 2017, the Court granted respondent's Rule 162 motion in order to allow additional time to consider the issues raised by respondent's motion. Accordingly, the case remains under consideration by the Court.

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respectively, and the following accuracy-related penalties: (1) with respect to underpayments attributable to disallowed carryover charitable deductions for 2006, 2007, and 2008, a 40% gross valuation misstatement penalty under section 6662(h) or, in the alternative, a 20% accuracy-related penalty under section 6662(a); and (2) with respect to an underpayment attributable to unreported interest for 2008, a 20% accuracy-related penalty under section 6662(a). Respondent determined the aforementioned section 6662(a) accuracy-related penalties on the grounds that (1) there was a substantial understatement of income tax or (2) petitioner was negligent or disregarded rules or regulations. See sec. 6662(b)(1) and (2).

The evidentiary record in this case was closed on February 27, 2014, and post-trial briefing was completed by the parties on August 25, 2014. Since that time, there have been significant developments in the case law concerning the application of section 6751(b)(1),[3] culminating with the issuance of the Court's opinion in Graev v. Commissioner (Graev III), 149 T.C. __ (Dec. 20, 2017), supplementing and overruling in part, 147 T.C. 460 (2016). Graev III sets forth the history of our interpretation of section 6751(b)(1).[4] Suffice it to say that, after having earlier taken a contrary position, in Graev III we held that the Commissioner's burden of production under section 7491(c)[5] includes establishing compliance with the written supervisory approval requirement of section 6751(b)(1).

Respondent has attached three documents to his motion. The first, marked by respondent as Exhibit A, is titled "Civil Penalty Approval Form" and, according to respondent, establishes that written supervisory approval was obtained for the assertion of an accuracy-related penalty for 2006 and 2007 for a substantial understatement of income tax. See sec. 6662(a), (b)(2), (d). The second, marked

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[3]Sec. 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."

[4]A more comprehensive discussion of the recent litigation concerning the application of sec. 6751(b)(1) is also found in our Order dated January 12, 2018.

[5]Under sec. 7491(c), the Commissioner bears the burden of production with respect to accuracy-related penalties and must come forward with sufficient evidence indicating that it is appropriate to impose them. See Higbee v. Commissioner, 116 T.C. 438, 446-447 (2001).

by respondent as Exhibit B, is also titled "Civil Penalty Approval Form" and, according to respondent, establishes that written supervisory approval was obtained for the assertion of an accuracy-related penalty for 2008 for negligence.[6] See sec. 6662(a), (b)(1), (c). The third, marked by respondent as Exhibit C, is titled "Memorandum" and, according to respondent, is a December 23, 2011 memorandum from Office of Chief Counsel Attorney Marissa J. Savit to Appeals Officer Gerald Fitzgerald, recommending that respondent assert the 40% gross valuation misstatement penalty under section 6662(h) or, in the alternative, the section 6662(a) accuracy-related penalty, for 2004[7] on the portion of the underpayment attributable to a disallowed $5,000,000 charitable contribution claimed for that year. Exhibit C includes no markings or other indications that Attorney Savit's immediate supervisor approved the recommendations made therein.

Discussion

Whether to reopen the record for the submission of additional evidence is a matter addressed to the sound discretion of the Court. See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 331-332 (1971); Rodman v. Commissioner, 542 F.2d 845, 859-860 (2d Cir. 1976), aff'g in part, rev'g in part and remanding T.C. Memo. 1973-277; Dynamo Holdings Ltd. P'ship v. Commissioner, 150 T.C. __, __ (slip op. at 10) (May 7, 2018); 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 (1) not merely cumulative or impeaching, (2) material to the issues involved, and (3) likely to change some aspect of the outcome of the case. See Butler v. Commissioner, 114 T.C. at 287; Fiedziuszko v. Commissioner, T.C. Memo. 2018-75; Azam v. Commissioner, T.C. Memo. 2018-72; Sarvak v. Commissioner, T.C. Memo. 2018-68.

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[6]Respondent represents that Revenue Agent Robert Marek initially determined the substantial understatement penalties for 2006 and 2007, and the negligence penalty for 2008, and that his immediate supervisor, Group Manager Michelle Paredes, subsequently approved those determinations in writing by executing Exhibits A and B.

[7]Respondent represents that Attorney Savit's memorandum refers to petitioner's 2004 taxable year because that was the year the purported charitable contribution (that resulted in the carryover charitable deductions claimed on the 2006, 2007, and 2008 returns) was made.

The evidence proffered by respondent is neither cumulative nor impeaching. Except to the extent respondent has argued that the notice of deficiency itself demonstrates compliance with section 6751(b)(1) (see infra pp. 5-6), the record includes no evidence as to whether respondent obtained the requisite supervisory approval of the initial penalty determinations. In the absence of such evidence, respondent cannot meet his burden of production concerning the accuracy-related penalties.[8] Thus, the proffered evidence is material.

Moreover, two of the three exhibits--Exhibits A and B, the purported penalty approval forms--are, if admitted, likely to change the outcome of this case. Exhibits A and B appear to establish that written supervisory approval was in fact obtained for the assertion of an accuracy-related penalty for a substantial understatement of income tax (for 2006 and 2007) and for negligence (for 2008). Yet, while Exhibits A and B may be, as respondent contends, admissible evidence under the business records exception to the rule against hearsay, see Rule 803(6), Fed. R. Evid.,[9] a party seeking to introduce evidence under the business records

[8]Petitioner did not allege in his petition, at trial, or in his briefs that respondent failed to comply with sec. 6751(b)(1) in asserting the accuracy-related penalties at issue. Thus, our now vacated opinion deemed the issue conceded. However, in view of our subsequent holding in Graev III that the Commissioner's burden of production under sec. 7491(c) includes establishing that the requisite supervisory approval was obtained, the fact that petitioner did not raise the issue is no longer dispositive.

[9]We note that Exhibits A and B might also constitute "verbal acts", i.e., a category of statements excluded from hearsay because "the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights." Fed. R. Evid. 801(c) advisory committee's note ("If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay."); see also Robertson v. U.S. Bank, N.A., 831 F.3d 757, 764 (6th Cir. 2016); United States v. Bowles, 751 F.3d 35, 39-40 (1st Cir. 2014); Mueller v. Abdnor, 972 F.2d 931, 937 (8th Cir. 1992); United States v. Aikins, 946 F.2d 608, 614-615 (9th Cir. 1990). We additionally note that Exhibits A and B, if offered with the proper certification, might be admissible as self-authenticating public records. See Rule 803(8) (exempting records of public agencies, when properly certified, from hearsay), Rule 902 (properly certified public records deemed self-authenticating), Fed. R.

(continued...)

exception must nevertheless lay a foundation therefor,[10] either by certification, see 902(11), Fed. R. Evid., or through the testimony of the custodian or another qualified witness, see Rule 803(6)(D), Fed. R. Evid. Respondent has neither filed a declaration (or certification) as to the authenticity of Exhibits A and B, nor proposed additional trial proceedings. Thus, while we will, for the reasons stated infra pp. 6-7, grant respondent's motion to reopen the record, we will exclude Exhibits A and B without prejudice.

As with Exhibits A and B, respondent argues that Exhibit C is admissible as a business record but, again, fails to lay a proper foundation for its admission. We will therefore exclude it without prejudice as well. In doing so, however, we must note that respondent's attempt to argue that the notice of deficiency was the "initial determination" of the section 6662(h) gross valuation misstatement penalties is misguided; Exhibit C--which predates the notice of deficiency by nearly four months--demonstrates that Attorney Savit "was the first person to recommend or direct inclusion" of that penalty.[11] See Graev III, 149 T.C. at __ (slip op. at 16). Consequently, the requisite written approval that must be established is that of Attorney Savit's immediate supervisor. There is no indication of such approval on Exhibit C, and respondent has not argued that such approval was obtained. We

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[9](...continued)
Evid.; see also United States v. Dickert, 635 F. App'x 844, 849-850 (11th Cir. 2016) (no abuse of discretion where district court admitted Internal Revenue Service Form 4340 as self-authenticating public record); Hughes v. United States, 953 F.2d 531, 539-540 (9th Cir. 1992) (same).

[10]A proper foundation must establish, at a minimum, "that the document was kept in the course of a regularly conducted business activity and also that it was the regular practice of that business activity to the make the record." Phoenix Associates III v. Stone, 60 F.3d 95, 101 (2d Cir. 1995) (internal quotation marks and brackets omitted); see also Raphaely Int'l, Inc. v. Waterman S.S. Corp., 972 F.2d 498, 502-503 (2d Cir. 1992).

[11]We note that in Graev III we rejected any distinction between initial determinations of a penalty made by a chief counsel attorney versus an examining agent: "Any 'initial determination' governed by section 6751(b), whether made by an examining agent or a chief counsel attorney, is mere advice until it receives the requisite supervisory approval and is finalized by the Commissioner or one of his agents." Graev III, 149 T.C. at __ (slip op. at 19-20).

therefore caution respondent that the purported memorandum, by itself, cannot establish his compliance with the written supervisory approval requirement of section 6751(b)(1).[12]

Petitioner argues that, in the event the record is reopened, petitioner "must be entitled to question the individuals who made the 'initial determinations' as well as their immediate supervisors who approved the determinations to confirm whether these penalties were properly asserted and whether Respondent complied with Code section 6751(b)." He also argues that he "must be entitled to discovery of email exchanges or memoranda exchanged between the individuals making the initial determinations and the immediate supervisors approving those penalties."

As noted above, with respect to Exhibits A and B, respondent has met the threshold test set forth in Butler v. Commissioner, 114 T.C. at 287. We must therefore balance the equities.

Appeal in this case (absent a stipulation to the contrary) is to the Court of Appeals for the Second Circuit. In that venue, the following factors are considered when determining whether to reopen the trial record: (1) the diligence (or lack thereof) of the moving party in submitting the evidence; (2) the possibility of prejudice to the nonmoving party if the record were reopened; and (3) where the interests of justice lie. See John v. Sotheby's Inc., 858 F. Supp. 1283, 1288 (S.D.N.Y. 1994), aff'd, 52 F.3d 312 (2d Cir. 1995); see also Dynamo Holdings Ltd. P'ship v. Commissioner, slip op. at 10-11.

We believe that reopening the record here serves the interests of justice. The record was closed in this case before we announced our holding in Graev III that demonstrating compliance with section 6751(b)(1) was part of the Commissioner's burden of production for a penalty in a deficiency case. In addition, petitioner did not allege in his petition, at trial, or on brief that respondent had failed to comply with section 6751(b)(1). Respondent was therefore justified in concluding that the

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[12]Petitioner has requested further discovery regarding respondent's compliance with sec. 6751 in this case. For the reasons stated infra p. 7, we will grant petitioner's request. Thus, we note that while Exhibit C would not change the outcome of this case, we exclude it without prejudice in view of the possibility that respondent has other evidence in his possession that Attorney Savit's immediate supervisor approved (in writing) the initial determination of the sec. 6662(h) penalties.

introduction of the purported penalty approval forms was not necessary. See Fiedziuszko v. Commissioner, T.C. Memo. 2018-75, *26. Moreover, "[a] change in legal standards is a proper ground for reopening proof." In re Chattanooga Wholesale Antiques, Inc., 930 F.2d 458, 464-465 (6th Cir. 1991) (finding no abuse of discretion where trial court reopened record to allow parties to present additional evidence in light of subsequent clarification of relevant statute by court of appeals); see also Sequa Corp. v. GBJ Corp., 156 F.3d 136, 144-145 (2d Cir. 1998) (finding that trial court abused its discretion by denying motion to reopen where it adopted legal theory neither party had anticipated during trial).

In order to eliminate any possible prejudice to petitioner from reopening the record for possible receipt of additional evidence from respondent, and to accord him any rights to which he would have been entitled if respondent had sought to introduce Exhibits A, B, and C at trial, we will allow discovery regarding Exhibits A, B, and C, as set forth below, and thereafter consider whether supplemental trial proceedings are necessary.

The foregoing considered, it is

ORDERED that respondent's Motion to Reopen the Record is granted in part and denied in part. It is further

ORDERED that the record is reopened for the purpose of receiving evidence, either in the form of a supplemental stipulation of facts or by way of a supplemental trial, regarding the section 6751(b)(1) penalty approval requirement and whether it is met in this case. It is further

ORDERED that Exhibits A, B, and C attached to Respondent's Motion to Reopen the Record are excluded from the record without prejudice. It is further

ORDERED that the parties shall have until September 28, 2018, to engage in the informal exchange of information as required by Rule 70 and, if the section 6751(b)(1) issue cannot be developed and resolved informally, to complete formal discovery. Such discovery shall be limited to the issue of respondent's compliance with section 6751(b)(1) in determining the accuracy-related penalties in this case and may include matters authorized by Rules 70, 71, 72, and 74. It is further

ORDERED that on or before October 12, 2018, the parties shall submit a joint status report advising the Court of the status of this matter and whether there is a need for a supplemental trial with respect to respondent's compliance with section 6751(b)(1) in asserting the accuracy-related penalties in this case.

(Signed) Joseph H. Gale
Judge

Dated: Washington, D.C.
July 20, 2018