 ALS

UNITED STATES TAX COURT
WASHINGTON, DC 20217

ABDUL M. MUHAMMAD,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 23891-15.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

This case is now before us on the Commissioner's unopposed motion to reopen the trial record to admit proof of compliance with I.R.C. section 6751(b)(1). The issues now before us are: (1) whether we should grant the Commissioner's motion (we decide that we should), and (2) whether the Commissioner has carried his burden of production to show compliance with section 6751(b)(1) (we hold that he has).

Background

At the time he filed his petition in this Court, Mr. Muhammad resided in Michigan.

Tax returns and audit

Mr. Muhammad filed tax returns for the years 2012 and 2013. The IRS examined those returns, and an examining agent proposed adjustments (i.e., multiple issues of unreported income, change of filing status, and disallowance of deductions and credits) that resulted in deficiencies. The agent also proposed for 2012 an addition to tax for failure to timely file the return and, as we set out in detail below, a determination of liability for an accuracy-related penalty pursuant to section 6662(a) and (d) for each of the two years.

SERVED Aug 24 2018

Penalty determination

The examining agent filled out a "Civil Penalty Approval Form" dated "03/25/2015". The form indicates that the penalty was to be imposed for "Substantial Understatement" under section 6662(d). In compliance with Internal Revenue Manual ("IRM") part 4.10.6.7(1) (05-14-1999), in the space on the form for "Reason(s) for Assertion of Penalty(s) IRM 4.10.6.7(1)" was written, "Substantial u/s penalty applies because the tax due is greater than 10% of the total tax and $5,000. The negligence penalty has not been determined * * *." The form identifies the "Examiner" as "Hill, B." At the bottom of the form was the caption--

> Group Manager Approval to Assess Penalties Identified Above
> and for Non-Assertion of Substantial Understatement Penalty
> Where Dollar Criteria for Penalty Has Been Met (IRM 20.1.5.1.6)

--and a line for "Group Manager Signature". On that line the signature "S. Peebles" is written. That signature is dated "4/29/2015". This form was not offered into evidence at the trial of this case.

Instructions in the Internal Revenue Manual

As of 2015, the IRM included, in addition to the provisions cited above, instructions about "Managerial Approval" of penalty determinations, stating that that approval must be made by the "immediate supervisor" (as required by section 6751(b)(1), discussed below). See IRM pts. 20.1.1.2.3(1), (8).

Notice of Deficiency

On June 12, 2015, the IRS issued to Mr. Muhammad the statutory notice of deficiency ("SNOD"), which determined tax deficiencies, the addition to tax for failure to timely file the 2012 return, and the accuracy-related penalties for both 2012 and 2013. Notwithstanding the statement on the Civil Penalty Approval Form that "[t]he negligence penalty has not been determined", the SNOD stated as to penalty, "It is determined that [portions] of the underpayment to [*sic*] tax is due to negligence", and the SNOD determined a penalty for 2012 even though the understatement of tax was not substantial (because it did not exceed $5,000). Mr. Muhammad timely mailed his petition to this Court on September 10, 2015.

Trial, bench opinion, and Rule 155 proceedings

Trial was conducted September 18, 2017. At the trial, the Commissioner did not offer into evidence the Civil Penalty Approval Form or any other evidence of compliance with section 6751(b)(1). Neither party made any reference to section 6751(b)(1) or supervisory approval of the penalty, either before or during trial.

On September 19, 2018, we read in open court a bench opinion that (1) resolved the deficiency issues largely, but not entirely, in the Commissioner's favor, (2) held that Mr. Muhammad is not liable for the late-filing addition to tax for 2012, and (3) held that the Commissioner met his burden of production to show liability for the accuracy-related penalties and that Mr. Muhammad did not make any showing of "reasonable cause" that would excuse him from that liability. By order of October 5, 2017, we transmitted to each party a transcript of the bench opinion and ordered that "decision will be entered under [Tax Court] Rule 155"--i.e., after a recomputation of the deficiencies.

On November 29, 2017, the Commissioner submitted his proposed computation. The computation reflected no penalty liability for 2012 (despite our finding of negligence) and reflected a penalty for 2013 based on a substantial understatement.

Mr. Muhammad's objection or an alternative computation was due by December 26, 2017, but he has never submitted an objection or an alternative computation.

Motion to reopen the record

On December 20, 2017 (before Mr. Muhammad's Rule 155 response was due), the Court issued its opinion in Graev v. Commissioner, 149 T.C. No. 23 (2017) (Graev III), holding for the first time that the Commissioner's burden of production under section 7491(c) includes showing compliance with the supervisory approval requirement of section 6751(b)(1). As we noted above, the Commissioner had not undertaken to make such a showing at the September 2017 trial of this case.

On February 6, 2018, the Commissioner moved to reopen the record. The motion asks "that Court receive into the record the Declaration of Shirley Peebles and Exhibit 1 attached thereto", with Exhibit 1 being the "Civil Penalty Approval

Form" described above. Ms. Peebles's declaration is made under penalty of perjury pursuant to 28 U.S.C. section 1746. The declaration authenticates the Civil Penalty Approval Form as a record taken from the IRS's administrative file for Mr. Muhammad and authenticates Ms. Peebles's signature on the form. The declaration also includes the statement,

> 3. As part of my duties as group manager, I was the immediate supervisor for B. Hill. * * *

By our order of February 7, 2018, we directed Mr. Muhammad to file a response to the Commissioner's motion, but he has not done so.

Discussion

I. Burden of proof and burden of production

In general, the IRS's notice of deficiency is presumed correct, "and the petitioner has the burden of proving it to be wrong". Welch v. Helvering, 290 U.S. 111, 115 (1933); see also Rule 142(a). However, under section 7491(c), "the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty * * * imposed by this title."

II. Accuracy-related penalty

Section 6662(a) and (b)(2) imposes a 20% accuracy-related penalty on any underpayment of Federal income tax which is attributable to negligence or to a substantial understatement of income tax. An understatement of income tax is substantial if it exceeds the greater of 10% of the tax required to be shown on the return or $5,000. Sec. 6662(d)(1)(A). For 2013 Mr. Muhammad's understatement exceeded $5,000, but for 2012 it did not. Thus, for 2012 Mr. Muhammad could bear penalty liability only for negligence and not for substantial understatement; for 2013 he could bear penalty liability for either. In our bench opinion previously issued in this case, we held that the Commissioner had met his burden of production as to negligence for both years and had shown that Mr. Muhammad is liable for the penalties at issue--except as to the matter of compliance with section 6751(b)(1), as to which our opinion was silent.

III. Supervisory approval under section 6751(b)(1)

Section 6751(b)(1) provides as follows:

> (b) Approval of assessment.--
>
> (1) In general.-- 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.

On December 20, 2017, this Court issued its opinion in Graev v. Commissioner (Graev III), 149 T.C. 23 (2017), supplementing and overruling in part Graev v. Commissioner (Graev II), 147 T.C. 460 (2016). In Graev III we held that the Commissioner's burden of production includes a showing under section 6751(b) that the penalties determined in the statutory notices were properly approved by the immediate supervisor.

IV. Reopening the record to admit proof of compliance with section 6751(b)(1)

However, as of the time of the September 2017 trial of this case, this Court had most recently held in Graev II that the question whether a penalty was properly approved under section 6751(b) was premature in a deficiency case, because the penalty had not yet been assessed. Three months later in Graev III we overruled and supplemented Graev II, and we accepted the holding of the Court of Appeals for the Second Circuit in Chai v. Commissioner, 851 F.3d 190, 221 (2d Cir. 2017), aff'g in part, rev'g in part T.C. Memo. 2015-42, 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."

At trial in September 2017, counsel for the Commissioner did not anticipate our overruling of Graev II and did not undertake to meet the burden of production that Graev III imposed. As we stated in Fiedziuszko v. Commissioner, T.C. Memo. 2018-75, at *26:

> Reopening the record here serves the interests of justice because the record was closed in this case before we issued Graev III and because petitioners never raised section 6751(b) as an issue before the record

> closed. Therefore, respondent was justified in concluding that introduction of the Civil Penalty Approval Form was not necessary. We also agree with respondent that the Civil Penalty Approval Form is a record kept in the ordinary course of a business activity and is authenticated by the declaration. See Fed. R. Evid. 803(6), 902(11). * * * [W]e believe that justice favors our exercise of our discretion to reopen the record.

For these reasons, and because Mr. Muhammad offers no objection, we will grant the IRS's motion to reopen the record. We now address the IRS's newly proffered evidence.

V. The admissibility and sufficiency of the declaration and form

Mr. Muhammad has made no objection to the admissibility of the Civil Penalty Approval Form and no objection or counter-argument to the Commissioner's assertion that he has met his burden of production under section 7491(c). We therefore sustain, on the basis of Mr. Muhammad's non-objection, the Commissioner's positions on both of these issues. Lest it appear, however, that reliance on the inaction of a self-represented petitioner might involve an injustice, we offer these further observations in support of that ruling.

A. Admissibility

Here, as in Fiedziuszko, we are presented with a Civil Penalty Approval Form and a declaration submitted to authenticate it. A form and a declaration are both out-of-court statements that, if offered to prove the matters asserted in them, are "hearsay". See Fed. R. Evid. 801(c). As a general rule, hearsay is inadmissible. See Fed. R. Evid. 802. But here, as in Fiedziuszko, there are applicable exceptions:

As for the Civil Penalty Approval Form, it purports to be a record of a regularly conducted activity within the meaning of Rule 803(6):

> Rule 803. Exceptions to the Rule Against Hearsay--Regardless of Whether the Declarant Is Available as a Witness
>
> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * * * * * *

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Thus, if the form can be authenticated--i.e., if it can be shown to be what it purports to be--then it can be admissible even though it is hearsay. Here that authentication is proffered by means of a declaration.

As for the Declaration of Shirley Peebles, which is also hearsay, the Commissioner properly relies on Fed. R. Evid. 902(11), which provides:

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * * * * * *

> (11) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice 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.

Rule 902(11) thus permits a showing of compliance with "the requirements of Rule 803(6)(A)-(C)" by means of a "certification". Ms. Peebles' declaration includes such a "certification" and is therefore properly used to authenticate the Civil Penalty Approval Form and thereby to render that form admissible under Rule 803(6)(D) above ("shown by * * * a certification that complies with Rule 902(11)").

We note, however, that neither Rule 803(6) nor Rule 902(11) permits a declaration or affidavit to be used generally to prove facts. Rule 902(11) permits only a "certification" (i.e., a certification that the record "meets the requirements of Rule 803(6)(A)-(C)"). Other factual assertions in a declaration would be hearsay outside the bounds of Rules 803(6) and 902(11); and--if a hearsay objection were raised--we would presumably not overrule the objection and rely on such hearsay to support factual findings. Cf. Azam v. Commissioner, T.C. Memo. 2018-72 ("Respondent identified no exception to the hearsay rule that would allow us to admit the declarations for a purpose beyond authentication of the underlying business record, see Clough v. Commissioner, 119 T.C. at 189-190").

B. The sufficiency of the Civil Penalty Approval Form

The form shows managerial approval of the assertion of the penalty. However, the form shows approval by a "Group Manager", and does not explicitly indicate that this manager was the "immediate supervisor". However, there are two possible means by which the form might be held sufficient:

1. The hearsay affidavit

Ms. Peebles's declaration asserts that "[a]s part of my duties as group manager, I was the immediate supervisor for B. Hill". The assertion is certainly

relevant here because section 6751(b)(1) requires written approval by "the immediate supervisor of the individual making such determination". (Emphasis added.) This factual assertion is hearsay outside the bounds of Rules 803(6) and 902(11). Consequently, if Mr. Muhammad had raised a hearsay objection, we would presumably have sustained it, and the Commissioner would not have been able to rely on it for purposes of meeting his burden of production to show that the "immediate supervisor" approved the penalty determination. However, Mr. Muhammad did not object, and we therefore could admit the document into evidence and rely on it to find that Ms. Peebles was the immediate supervisor, as she says.

2. The presumption of regularity

As we have noted, the phrase "immediate supervisor" does not appear on the Civil Penalty Approval Form; and instead the approving official is identified by the title "Group Manager". While it is possible that a "Group Manager" might not be the "immediate supervisor" of the "Examiner", both the text of section 6751(b)(1) and the IRS's instructions to its personnel in the Internal Revenue Manual (cited above) are clear and repetitive that "managerial" approval must come from the "immediate supervisor". It appears possible that the Commissioner could argue for a presumption that the "Group Manager" is the "immediate supervisor" and that the form by itself therefore suffices to meet the Commissioner's burden of production, by invoking the "presumption of regularity". See Walker v. Commissioner, T.C. Memo. 2018-22, at *19 n.6, citing United States v. Ahrens, 530 F.2d 781, 785 (8th Cir. 1976) ("'The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.' United States v. Chem. Found., Inc., 272 U.S. 1, 14-15, * * * (1926)").

Since the Commissioner has not invoked the presumption of regularity (and Mr. Muhammad has not had an occasion to attempt to rebut it), and since for other reasons (i.e., Mr. Muhammad's non-objections) we sustain the Commissioner's position as to the admissibility and sufficiency of the form, we need not rely on the presumption of regularity in order to conclude that the Commissioner has met his burden of production as to penalty.

We note that the presumption of regularity could not be successfully invoked to presume supervisory approval of penalty from the mere notice of deficiency that determined the penalty liability. The SNOD does not allege supervisory approval, and--more significantly--this case is an instance where the Civil Penalty Approval

Form had explicitly stated that "[t]he negligence penalty has not been determined" (emphasis added), but the SNOD issued thereafter nonetheless stated as to penalty that "[i]t is determined that [portions] of the underpayment to [*sic*] tax is due to negligence". Plainly, supervisory approval had been denied for a negligence penalty, and the SNOD was out of bounds in purporting to determine a negligence penalty.

C. Penalty liability

For 2012 Mr. Muhammad's understatement of tax was not "substantial" (because it was less than $5,000). He could therefore be liable for accuracy-related penalty only on grounds of negligence, but the Civil Penalty Approval Form did not approve a negligence-based penalty. Rather, it explicitly stated, "The negligence penalty has not been determined * * *." Therefore, Mr. Muhammad is not liable for penalty for 2012. The Commissioner's Rule 155 computation in fact proposes no 2012 penalty (notwithstanding our holding of negligence, made before the Civil Penalty Approval Form was put into the record); and we infer that this is a deliberate and appropriate concession by the Commissioner based on the lack of supervisory approval of a negligence penalty.

For 2013 Mr. Muhammad's understatement of tax was "substantial". The Civil Penalty Approval Form did approve a substantial understatement penalty. Therefore, Mr. Muhammad is liable for penalty for 2013, as the Commissioner proposes.

For the reasons stated above, it is

ORDERED that the Commissioner's motion to reopen the record (Doc. 27) is granted. It is further

ORDERED that the Clerk of the Court shall mark as Exhibit 18-R the Civil Penalty Approval Form that is attached to the motion (Doc. 27) as "Exhibit 1". It is further

ORDERED that Exhibit 18-R is received into evidence, and that the record is closed.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
August 23, 2018