Submitted - Halpern

UNITED STATES TAX COURT

WASHINGTON, DC 20217

SLC

NATHANIEL A. CARTER & STELLA C. CARTER, ET AL.,		
Petitioners		
v.	Docket Nos.	23621-15, 23647-15.
COMMISSIONER OF INTERNAL REVENUE,		
Respondent		

ORDER

Respondent has moved pursuant to Rule 50, Tax Court Rules of Practice and Procedure (motion), to reopen the record to allow him to admit evidence to establish that he has met the requirements of section 6751(b)(1) in determining the penalties set forth in the tables that follow. Petitioners object.

Unless otherwise stated, all section references are to the Internal Revenue Code of 1986, as amended. All dollar amounts have been rounded to the nearest dollar.

Background

In docket No. 23621-15, by a statutory notice of deficiency dated August 18, 2015, respondent determined deficiencies and penalties with respect to the Carters as follows:

		Penalties	
Year	Deficiency	Sec. 6662(a)	Sec. 6662(h)
2011	$611,144	$14,343	$215,772
2012	554,845	---	221,938
2013	809,461	52	320,282

In docket No. 23647-15, by a statutory notice of deficiency dated August 18, 2015, respondent determined deficiencies and penalties with respect to Mr. Evans as follows:

		Penalties	
Year	Deficiency	Sec. 6662(a)	Sec. 6662(h)
2011	$2,564,241	$16,723	$992,250
2012	104,606	20,921	---

When petitioners filed the petitions in these consolidated cases, they all resided in Georgia.

Beginning on April 11, 2017, we tried these consolidated cases, and the cases remain 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 accuracy-related 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 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 these cases is whether petitioners are liable for section 6662 accuracy-related penalties.

Reopening the record for the submission of additional evidence lies within the Court's discretion. See Dynamo Holdings Ltd. P'ship v. Commissioner, 150 T.C. __, __ (May 7, 2018, slip op. at 10). If an appeal in this case is taken, venue is likely the Court of Appeals for the Eleventh Circuit. See sec. 7482(b)(1)(A). In United States v. Byrd, 403 F.3d 1278 (11th Cir. 2005), the Court of Appeals adopted a four-part inquiry to aid courts in determining whether they should reopen a record. Id. at 1283-1284. The four factors are (1) the timeliness of the motion, (2) the character of the testimony to be offered, (3) the effect of granting the motion, and (4) the reasonableness of the request. Id. at 1284. The factor most relevant to these cases is the third: the effect of granting the motion. If we conclude that granting a motion to reopen the record would not affect the outcome of the cases, the motion should be denied. Granting such a motion would be a meaningless gesture if it would not affect the outcome, and it would be a waste of judicial resources. See Dynamo Holdings Ltd. P'ship v. Commissioner, 150 T.C. at __ (slip op. at 10).

By the motion, respondent seeks to reopen the record with respect to the case at docket No. 23621-15 to receive into evidence (1) the declaration of Donald Maclennan (declaration 1), Supervisory Internal Revenue Agent and the immediate supervisor of Christopher Dickerson, and (2) a Civil Penalty Approval Form (form 1), with a signature block under a heading reading in part: "Group Manager Approval to Assess Penalties Assessed Above" and followed by a signature block labeled: "Group Manager Signature" and containing the printed name: "Donald R. Maclennan". By the motion, respondent also seeks to reopen the record with respect to the case at docket No. 23647-15 to receive into evidence another declaration of Donald Maclennan (declaration 2) and another a Civil Penalty Approval Form (form 2), with the same signature block and printed name.

We set forth in the margin material particulars of the declarations and the forms.[1]

Petitioners object to our granting the motion for a number of reasons. The four exhibits contain inadmissable hearsay. Form 2 shows a printed date of 4/30/14, more than a year earlier than the date next to Mr. Maclennan's signature block, 5/19/15. Forms 1 and 2 call for a signature but, in the space for the signature, show only Mr. Maclennan's printed name. Forms 1 and 2 lack any justification for Mr. Maclennan's approval.

Discussion

Here, the effect of granting the motion to reopen the record would be to allow respondent to offer evidence that the requirements of section 6751(b)(1) have been satisfied. Such evidence is material to the penalty issues in these cases. Moreover, the evidence may well change the outcome of the case because, without the evidence, our holding in Graev would prevent us from sustaining the section 6662 penalties.

---

[1]In pertinent part, declaration 1 recites the following: The declaration is made under penalty of perjury, pursuant to the laws of the United States, including 26 U.S.C. sec. 1746. On May 19, 2015, as part of his duties as a Supervisory Internal Revenue Agent, Mr. Maclennan was the immediate supervisor of Mr. Dickerson. Mr. Dickerson had performed the examination of the Carters' Form 1040 for the tax years 2011, 2012, and 2013 and had proposed a penalty under sec. 6662(h) in connection with his examination of each year. Mr. Maclennan approved the penalties on May 19, 2015, by signing the Civil Penalty Approval Form in accordance with sec. 6751(b). Mr. Maclennan has personal knowledge of the Internal Revenue Service's (IRS's) record keeping system, the attached exhibits are kept in the course of the IRS's regularly conducted business activity, and it is the IRS's regular practice to keep such records in the administrative file. The facts of the declaration are known to him 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. He declares under penalty of perjury that the declaration is true and correct. Declaration 2 is substantially the same but with respect to Mr. Evans. Form 2 has at the top of the form the printed date 4/30/14, which contrasts with the date next to Mr. Maclennan's signature block, 5/19/15, and the date printed at the top of form 1, 4/30/15.

The record in this case was closed before we issued our report in Graev, and petitioners never raised section 6751(b) as an issue prior to the closing of the record. Respondent was, therefore, justified in concluding that introduction of forms 1 and 2, the Civil Penalty Approval Forms, was unnecessary. Respondent request to reopen the record is reasonable, and he has moved promptly to do so in order to introduce the exhibits. As will be discussed, forms 1 and 2 are self-authenticating documents. The interests of justice would be served by reopening the record to allow respondent to offer evidence that he satisfied the requirements of section 6751(b)(1). We will reopen the record. We now address the proffered evidence.

In each of these consolidated cases, we are presented with a Civil Penalty Approval Form and a declaration submitted to authenticate it. In each case, both documents are out-of-court statements objected to by petitioners because, petitioners claim, they are offered to prove the matters asserted in them and are, thus, "hearsay". See Fed. R. Evid. 801(c). As a general rule, hearsay is inadmissible. See Fed. R. Evid. 802. There are exceptions to the general rule.[2]

As to forms 1 and 2, the Civil Penalty Approval Forms, respondent offers that the forms fall under an exception to the hearsay rule for records of a regularly conducted activity. Rule 803(6), Fed. R. Civ. P., provides:

---

[2]It may well be that we need not find any exception to the rule against hearsay for forms 1 and 2, the Civil Penalty Approval Forms, because the forms are evidence of a verbal act: proffered to show that Mr. Maclennan approved the penalties, not that the penalties were justified or even what he was thinking when he approved them. As the notes to Fed. R. Evid. 801(c) state: "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." Fed. R. Evid. 801(c) advisory committee's note; see also, e.g., Gen. Tire of Miami Beach, Inc. v. NLRB, 332 F.2d 58, 60-61 (5th Cir. 1964) (statement is nonhearsay verbal act if "inquiry is not the truth of the words said, merely whether they were said"). Respondent has not made that argument, and, since respondent asks us to consider the forms under an exception to the general rule for domestic records of a regularly conducted business, we will do so.

Rule 803. Exceptions to the Rule Against Hearsay

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 forms can be authenticated--i.e., if they can be shown to be what they purport to be--then they can be admissible even though they are hearsay. Here, in order to authenticate the forms, respondent proffers two declarations.

As for declarations 1 and 2, Mr. Maclennan's declarations, which are also hearsay, respondent properly relies on Rule 902(11), Fed. R. Evid., for authority that the two declarations serve to authenticate the two forms. The rule 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), Fed. R. Evid., thus permits a showing of compliance with "the requirements of Rule 803(6)(A)-(C)" by means of a "certification." As set forth in declarations 1 and 2, Mr. Maclennan made those declarations under penalty of perjury, pursuant to the laws of the United States, including 28 U.S.C. sec. 1746.[3] The declarations, thus, qualify as "certifications" within the meaning of Rule 902(11), Fed. R. Evid.,[4] and are properly used to authenticate forms 1 and

---

[3]28 U.S.C. sec. 1746 provides:

Wherever, under any law of the United States or under any rule * * * made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same * * *, such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury * * *.

[4]The Advisory Committee Notes pertaining to Rule 902(11), Federal Rules of Evidence, state in pertinent part with respect to the 2000 amendments: "A

2, the Civil Penalty Approval Forms, and thereby render those forms admissible under Rule 803(6)(D), Fed. R. Evid., above ("shown by * * * a certification that complies with Rule 902(11)").

Petitioners' particular objections (beyond hearsay) to forms 1 and 2, e.g., that they do not contain a "wet" signature, go to the weight we might attach to the exhibits, not to whether they are self-authenticating records of a regularly conducted activity. We shall, therefore, receive into evidence forms 1 and 2 as self-authenticated certified domestic records of a regularly conducted activity similarly described under an exception to the hearsay rule. See Fed. R. Evid. 803(6), 902(11).

Nevertheless, while forms 1 and 2 do show managerial approval for assessment of the penalties, they merely show approval by a "Group Manager", and do not explicitly indicate that the manager was the "immediate supervisor", a necessary element under section 6751(b)(1). Forms 1 and 2, thus, lack evidence of a fact necessary for respondent to carry his section 6751(b)(1) burden.

Respondent seeks to carry that burden, and to supply that missing fact, by way of Mr. Maclennan's declarations. Mr. Maclennan's declarations assert that "[a]s part of my duties as a Supervisory Internal Revenue Agent, I was the immediate supervisor of Christopher Dickerson". However, 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 we could not 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[.]"). Respondent cannot, therefore, rely on declarations 1 and 2 for purposes of meeting his burden of production to show that the "immediate supervisor" approved the penalty determinations.

---

declaration that satisfies 28 U.S.C. § 1746 would satisfy the declaration requirement of Rule 902(11), as would any comparable certification under oath."

Having determined to open the record to allow respondent to offer evidence that he satisfied the requirements of section 6751(b)(1), we will allow respondent the opportunity to offer admissible evidence or to make argument to show the requisite managerial approval. We will allow petitioners 30 days to conduct discovery, if they wish, relevant to the question of whether Mr. Maclennan was the immediate supervisor of Mr. Dickerson. Upon completing any discovery (or in the absence of any discovery), perhaps the parties will be able to stipulate that Mr. Maclennan was or was not Mr. Dickerson's immediate supervisor. If so, the parties are to file with the Court a supplemental stipulation of facts. If not, either party may move for a supplemental evidentiary hearing to introduce evidence, or respondent may make further argument that there are grounds sufficient for the Court to infer Mr. Maclennan's supervisory status. We will accord petitioner leave to make further argument.

It is, therefore,

ORDERED that the motion is granted, in that forms 1 and 2 are received into evidence and declarations 1 and 2 are received into evidence for the purposes of certifying that forms 1 and 2, respectively, are domestic records that meet the requirements of Rule 902(11), Fed. R. Evid. It is further

ORDERED that the Clerk of the Court shall mark forms 1 and 2 and declarations 1 and 2 as exhibits 146-R, 147-R, 148-R, and 149-R, respectively. It is further

ORDERED that petitioners may, for 30 days from the date of this order, conduct discovery, as described above, which respondent shall promptly answer. It is further

ORDERED that, on or before October 9, 2018, either party may move for a supplemental evidentiary hearing, as described above, and, also on or before October 9, 2018, in lieu of, or in addition to moving for a supplemental hearing, respondent has leave to file a memorandum of law making further argument, as described above. It is further

ORDERED that, if neither party requests a supplemental hearing, petitioners have until October 19, 2018, to notify the Court that they wish to make further argument as to Mr. Maclennan's supervisory role and, if they so notify the Court, they have until November 9, 2018, to file a memorandum of law making such argument.

(Signed) James S. Halpern
Judge

Dated: Washington, D.C.
September 4, 2018