

**UNITED STATES TAX COURT
WASHINGTON, DC 20217**

Tribune Media Company f.k.a. Tribune Company))	
& Affiliates, et al.,)	
)	
Petitioners,)	
)	
v.)	Docket No. 20940-16, 20941-16.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

These consolidated cases are tentatively set for a special trial session on October 28, 2019, in Washington, D.C.

On July 23, 2018, the Tribune Media Company (Tribune Media) and the tax matters partner of Chicago Baseball Holdings, LLC (Chicago Baseball) (collectively, Tribune) filed a motion to compel the production of documents. In its motion, Tribune requests that we order the Commissioner to produce documents responsive to its first request for production of documents.

Tribune argues that the requested documents are relevant to the written supervisory approval of penalties required by section 6751(b).¹ Tribune further argues that the Commissioner’s privilege logs are inadequate and his claims of attorney-client privilege, work-product doctrine, and deliberative process are unfounded. Finally, Tribune contends that the Commissioner has waived his claims to attorney-client privilege and work-product doctrine by intentionally disclosing three documents that the Commissioner previously presented as satisfying section 6751(b).

¹ Unless otherwise indicated, all section references are to the Internal Revenue Code (Code) for the years at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

In response, the Commissioner argues that he provided Tribune with five documents evidencing supervisory approval under section 6751(b), and that any documents beyond those five documents are irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. The Commissioner contends that “[t]he inquiry concerning written supervisory approval of the penalties should be limited to these five documents, not the entire universe of electronically stored information with respect to each custodian.” Finally the Commissioner argues that his privilege logs adequately state the basis for withholding each document, his claims of attorney-client privilege and work-product doctrine are valid, and his production of evidence of complying with section 6751(b) does not waive any privileges.

With this order, we partially grant Tribune’s request. To the extent we grant Tribune’s request, we order the Commissioner to produce an updated privilege log.

I. Background

On June 28, 2016, the Commissioner issued a notice of deficiency (NOD) to Tribune Media and a notice of final partnership administrative adjustment (FPAA) regarding Chicago Baseball. In both the NOD and the FPAA, the Commissioner determined a 40% gross valuation penalty under section 6662(h) and in the alternative, a 20% accuracy-related penalty under section 6662(a) for negligence, substantial understatement, or valuation misstatement.

Tribune Media and the tax matters partner of Chicago Baseball timely petitioned the Court, and the parties moved to consolidate the cases.

During informal discovery Tribune requested, among other items, documents from the Commissioner’s administrative files from the audit. As part of his first response, the Commissioner provided a memorandum from Naseem J. Khan, an associate area counsel, dated March 15, 2017. In Ms. Khan’s memorandum, she “intended to memorialize the steps taken by the IRS Counsel to satisfy the requirements of I.R.C. section 6751(b)(1) for the approval of the initial determination of the assessment of a 40 percent gross valuation misstatement penalty under I.R.C. section 6662(h)” with respect to Tribune Media and Chicago Baseball “for their respective taxable years ended in December 2009.”

Ms. Khan’s memorandum further states that she was the immediate supervisor of Daniel M. Trevino, a local counsel attorney assigned to assist

revenue agents in examining Tribune Media's and Chicago Baseball's returns for taxable years ending in December 2009.

Mr. Trevino reviewed the revenue agents' notice of proposed adjustments issued to Tribune Media and Chicago Baseball. In the proposed adjustments the revenue agents proposed 20% accuracy-related penalties under section 6662 due to negligence or, in the alternative, substantial valuation misstatement. After reviewing the revenue agents' proposed adjustments Mr. Trevino recommended seeking the 40% gross valuation misstatement penalty under section 6662(h). The notice of proposed adjustment issued to Tribune Media and Chicago Baseball included the determination of a section 6662(h) 40% penalty, and in the alternative, a 20% penalty under section 6662(a).

As Mr. Trevino's immediate supervisor, Ms. Khan orally approved the determination of the section 6662(h) 40% penalty in February of 2016 and approved it in writing on June 28, 2016, the day the notice of deficiency and FPAA were issued to the petitioners.

The parties continued with informal discovery, and after Tribune's second informal discovery request, the Commissioner produced a declaration from Liza F. Valdez, a supervisory revenue agent and immediate supervisor of revenue agent H. Paul Unger, dated April 18, 2017. Ms. Valdez's declaration states that Mr. Unger was a revenue agent and team coordinator assigned to the examinations of Tribune Media's and Chicago Baseball's returns for taxable years ending in 2009. In December 2014, Mr. Unger made the recommendation for section 6662(a) 20% penalties for Tribune Media and Chicago Baseball. At the time of the recommendation, Ms. Valdez orally approved Mr. Unger's recommendation of penalties.

In March 2016, after receiving advice from attorneys in the Office of Chief Counsel, Mr. Unger recommended section 6662(h) 40% penalties for Tribune Media's and Chicago Baseball's respective returns for taxable years ending in December 2009. This recommendation was orally approved by Ms. Valdez.

Tribune submitted their third and fourth informal requests for discovery near the end of 2017 and early 2018, respectively. Between these requests the Court issued its decision in Graev v. Commissioner (Graev III), 149 T.C. __ (Dec. 20, 2017), supplementing and overruling in part 147 T.C. 460 (2016). In Graev III we held that written approval of the initial penalty determination under section 6751(b) must be obtained no later than the date of the notice of deficiency is issued

or the date the Commissioner filed an answer or amended answer first asserting a penalty.

In response to Tribune's requests, the Commissioner informed Tribune that his position regarding section 6751(b) supervisory approval had changed, and he produced new documents that he intended to rely on to satisfy the requirements set forth in Graev III. The documents on which the Commissioner intends to rely for section 6751(b) approval include the following:

1. Form 3198, Special Handling Notice for Examination Case Processing date April 21, 2016;
2. Form 5701, Notice of Proposed Adjustment dated March 31, 2016;
3. A printout of an email chain containing handwritten notes created in January and February 2017;
4. A memorandum from Ms. Khan returning her approval of the proposed NOD dated June 28, 2016; and
5. A memorandum from Ms. Khan returning her approval of the proposed FPAA dated June 28, 2016.

In addition to the documents above, the Commissioner provided privilege logs listing over 1,000 documents responsive to Tribune's requests.

Unsatisfied with the Commissioner's production, Tribune made their first formal request for production of documents on June 8, 2018, which requested the information identified in their second, third, and fourth Branerton requests. Tribune followed up with a motion to compel production of documents the following month.

II. Tribune's Motion to Compel

Neither party has filed a motion for summary judgment as to section 6751(b) supervisory approval, and the sole issue is whether the Commissioner has complied with the Court's discovery rules.

Tribune's motion asks us to compel the Commissioner's production of documents relating to supervisory approval under section 6751(b). Tribune argues that they "are entitled to all documents that would place Respondent's irregular 'approvals' in context, thus facilitating a complete investigation of the written-approval issue" and that "[t]he requested documents are relevant to whether Respondent obtained valid written approval."

In its request for production, Tribune seeks responses to their second, third, and fourth Branerton requests.

A. Branerton Request 2

Requests 1 through 8 of Tribune's second Branerton request seek information relating to the determination of penalties under section 6662(c), (d), (e), and (h) as to both Tribune Media and Chicago Baseball. They request the following information (paraphrasing):

a. All documents that constitute a written approval by any supervisor of any recommendation or determination to assert or to assess the addition to tax.

b. With respect to each written approval provided in response to (a), (i) the supervisor's name and title at the time of the approval, (ii) the name of the individual who made the recommendation or determination that was approved, (iii) the individual's title at the time of the approval, and (iv) all documents that reflect the individual's recommendation or determination.

c. With respect to each written approval provided in response to (a), whether the supervisor was the "immediate supervisor" (as that term is defined in I.R.M. 20.1.1.2.3) of the individual who made the recommendation or determination that was approved.

We will grant Tribune's motion as to paragraphs 1 through 8 of Tribune's second Branerton request. To the extent the Commissioner's response to date is incomplete, we order the Commissioner to supplement his response. These requests seek facts relevant to written supervisory approval of the penalties determined in the NOD and FPAA, including facts surrounding who made and who approved the determination. These facts are also relevant to identifying what the supervisor approved. In short, these facts are relevant to the supervisory approval requirement of section 6751(b)(1).

Request 9 of the second Branerton request asks the Commissioner to "specify whether Ms. Khan is using the term 'immediate supervisor' as it is defined in I.R.M. 20.1.1.2.3. If Ms. Khan is not using the term as it is defined in

I.R.M. 20.1.1.2.3, please specify how she is using the term.” The Commissioner satisfied this request in his response dated May 22, 2017.

B. Branerton Request 3

Tribune’s third Branerton request seeks further documents relating to the penalties determined with regard to Tribune Media and Chicago Baseball for their taxable years ending in December 2009. They requested the following documents (again, paraphrasing):

1. Documents related to the Commissioner’s consideration, determination, or approval of penalties or additions to tax with respect to Tribune Media for the 2009 tax year.
2. Documents related to the Commissioner’s consideration, determination, or approval of penalties or additions to tax with respect to Chicago Baseball for the 2009 tax year.
3. All forms, checklists, or other documents that IRS personnel may use to memorialize approval of penalties or additions to tax.

The documents and information sought by Tribune in its third Branerton request are not reasonably calculated to lead to the discovery of admissible evidence, and the request is not proper under Greenberg’s Express, Inc. v. Commissioner, 62 T.C. 324 (1974). We have previously stated that “it would be imprudent for this Court to now begin examining the propriety of the Commissioner’s administrative policy or procedure underlying his penalty determinations.”² It has long been settled law that we do not look behind the Commissioner’s determinations. When Congress enacted section 6751(b) it “understood the longstanding rule of Greenberg’s Express * * * and at that time did not deem it necessary to expand our jurisdiction or overturn our precedent”.³ Written supervisory approval under section 6751(b)(1) “requires just that: written supervisory approval”; we do not review or second-guess the approval itself.⁴ We make our own de novo determination of the applicability of any penalty; we do not

² Raifman v. Commissioner, T.C. Memo 2018-101, at *61 (citing Greenberg’s Express, Inc. v. Commissioner, 62 T.C. 324, 328-329 (1974)).

³ Raifman v. Commissioner, at *61 n.46 (citing Lorillard v. Pons, 434 U.S. 575, 580 (1978)).

⁴ Raifman v. Commissioner, at *61.

conduct a review of the Commissioner's policies or procedures in determining penalties other than to confirm that written supervisory approval occurred. Paragraphs 1 and 2, above, attempt to look behind the Commissioner's notice of deficiency and FPAA, and therefore we deny the requests.⁵ Paragraph 3 seeks to have the Commissioner produce all documents he uses "to memorialize approval of penalties or additions to tax." What forms might be available to provide written supervisory approval is not relevant to the straightforward question of whether supervisory approval occurred in this case. Thus, the request is not relevant. Tribune's motion to compel a response to Branerton request 3 will be denied.

C. Branerton Request 4

Tribune's fourth Branerton request seeks documents mentioned in Ms. Kahn's two memoranda dated June 28, 2016, Ms. Kahn's memorandum dated March 15, 2017, and Ms. Valdez's declaration dated April 18, 2017. We take each in turn.

1. Ms. Kahn's June 28, 2016, Memoranda

Requests 1 and 2 seek the Commissioner's production of "the proposed SNOD" and "the proposed FPAA" mentioned and attached to Ms. Kahn's two memoranda dated June 28, 2016. The requests are relevant to the Commissioner's reliance on these documents for supervisory approval under section 6751(b) because they may demonstrate what the supervisor approved. We grant Tribune's motion as to these documents.

2. Ms. Kahn's March 15, 2017, Memorandum

Requests 3 through 7 seek the Commissioner's production of documents mentioned in Ms. Kahn's March 15, 2017, memorandum. But having been executed after the notice of deficiency and FPAA, Ms. Kahn's March 15, 2017, memorandum could not satisfy supervisory approval post Graev III. Accordingly, the memorandum and most of its underlying documents generally are not relevant to section 6751(b) supervisory approval. But Ms. Kahn's March 15, 2017, memorandum also references "my prior written approval dated June 28, 2016", which is relevant to the issue of supervisory approval. Accordingly, we will deny requests 3 through 6. To the extent request 7 (relating to the prior written approval

⁵ See Greenberg's Express, Inc. v. Commissioner, 62 T.C. at 327.

of June 28, 2016) is not coextensive with requests 1 and 2, we grant Tribune's motion.

3. Ms. Valdez's April 18, 2017, Declaration

Requests 8 through 17 seek documents mentioned in Ms. Valdez's April 18, 2017, declaration. Having been executed after the notice of deficiency and FPAA, Ms. Valdez's April 18, 2017, declaration could not satisfy the supervisory approval requirement of section 6751(b). Accordingly, the declaration and its underlying documents are not relevant. We will deny requests 8 through 17.

D. The Commissioner's Privilege Log

Tribune argues that the Commissioner's privilege log is inadequate and that his privilege qualifiers are "so broad as to be meaningless." Tribune also contends that the Commissioner has waived his right to the attorney-client privilege and work-product doctrine by intentionally disclosing Ms. Kahn's March 15, 2017, memorandum and her June 28, 2016, memoranda approving the notice of deficiency and FPAA.

We have held that many of the items requested by Tribune are irrelevant. Our ruling may well render many (or all) of the items on the privilege log as outside the scope of discovery. Rather than waste the Court's resources evaluating privilege claims that have been rendered moot, we will order the Commissioner to produce an updated privilege log containing only those privileged items that remain responsive to the requests addressed in this order.

In producing that privilege log, we remind the Commissioner that the burden of proving that a privilege applies to a communication is on the party asserting the privilege.⁶ We have held that "[b]lanket claims of privilege * * * are insufficient to sustain a claim of attorney-client privilege."⁷ The Tax Court Rules of Practice and Procedure are silent on the issue of proving a privilege applies; therefore, we look to the Federal Rules of Civil Procedure.⁸ The Federal Rules of Civil Procedure provide that the party asserting privilege must "describe the nature of

⁶ Bernardo v. Commissioner, 104 T.C. 677 at 682 (1995).

⁷ Bernardo v. Commissioner, 104 T.C. at 682 (citing Zaentz v. Commissioner, 73 T.C. 469, 475 (1979)).

⁸ Rule 1(b); Pacific Management Group v. Commissioner, T.C. Memo. 2015-97, at *5.

the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.”⁹

An adequate privilege log is a method by which a party may meet its burden of proof.¹⁰ A privilege log must set forth adequate facts to establish each element of the claimed privilege.¹¹ The privilege log must contain enough detail to enable the requesting party and this Court to determine whether the privilege is properly asserted.¹² This would typically include information regarding who a communication is from and to, the date of the communication, and its subject matter. A privilege log that does not state the subject of the communications at issue or indicate the contents of a document is insufficient.¹³

To give effect to the foregoing, it is

ORDERED that Tribune’s motion to compel production of documents filed July 23, 2018, is granted to the extent described above. It is further

ORDERED that, in conformity with this Order, the Commissioner shall produce any further documents to Tribune by September 24, 2018. It is further

ORDERED that the Commissioner shall file a status report by September 28, 2018, informing the Court of the status of his production of documents in response to this order and attaching an updated privilege log in conformity with this Order.

(Signed) Ronald L. Buch
Judge

Dated: Washington, D.C.
September 12, 2018

⁹ See Fed. R. Civ. P. 45(e)(2)(A)(ii).

¹⁰ Pacific Management Group v. Commissioner, at *6-*7.

¹¹ Pacific Management Group v. Commissioner, at *6.

¹² Pacific Management Group v. Commissioner, at *6.

¹³ Pacific Management Group v. Commissioner, at *6-*7.