

UNITED STATES TAX COURT  
 WASHINGTON, DC 20217

ROY E. HAHN & LINDA G. MONTGOMERY, )  
 )  
 Petitioners, )  
 )  
 v. ) Docket No. 1910-14.  
 )  
 COMMISSIONER OF INTERNAL REVENUE, )  
 )  
 Respondent )

**ORDER**

This case was tried during the Court’s October 21, 2016, San Francisco, California, trial session. One of the issues in this case is whether petitioners are liable for an accuracy-related penalty under section 6662(a)<sup>1</sup> for tax year 2000. Pending before the Court is respondent’s Motion to Reopen the Record, filed February 9, 2018.

Background

By Order dated April 3, 2017, the Court closed the record in this case. Before the Court closed the record, neither party attempted to introduce evidence with respect to the Commissioner’s compliance with the written supervisory-approval requirement of section 6751(b)(1) (section 6751(b)(1) requirement). The last brief ordered by the Court was filed on October 16, 2017.<sup>2</sup>

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<sup>1</sup>Unless otherwise indicated, all section references are to the Internal Revenue Code and all Rule references are to the Tax Court Rules of Practice and Procedure.

<sup>2</sup>On November 30, 2016, the Court issued its opinion in Graev v. Commissioner, 147 T.C. \_\_\_ (Nov. 30, 2016) (Graev II), where we held that the Commissioner was only required to comply with the section 6751(b)(1) requirement prior to the actual assessment of applicable penalty. At the close of the record in this case, and through the completion of briefing, Graev II was controlling in this case. See Golsen v. Commissioner, 54 T.C. 742, 757 (1970), aff’d, 445 F.2d 985 (10th Cir. 1971).

On December 20, 2017, this Court released Graev v. Commissioner (Graev III), 149 T.C. \_\_ (Dec. 20, 2017), supplementing and overruling in part 147 T.C. 460 (2016). In Graev III, 149 T.C. at \_\_ (slip op. at 14), this Court reconsidered its position in Graev II, and held proof of compliance with the section 6751(b)(1) requirement was part of the Commissioner's burden of production with respect to penalties in a deficiency case.

On January 23, 2018, the Court issued an Order ordering respondent to file a response by January 31, 2018, that (1) addressed the effect of Graev III in this case, and (2) directed the Court to any evidence in the record of this case relevant to ascertaining whether the Commissioner complied with the section 6751(b)(1) requirement. That Order also afforded petitioners the opportunity to respond to the Court's Order on or before February 9, 2018, and directed the parties to file any motion they may wish to make with respect to application of the section 6751(b)(1) requirement on or before February 15, 2018.

On January 31, 2018, respondent filed his Response to Order Dated January 23, 2018 (respondent's response). In that response, respondent stated that: (1) he could not direct the Court to any evidence relevant to determining whether the Commissioner complied with the section 6751(b)(1) requirement; (2) he possessed records relevant thereto, however, and that he had shared those records with petitioners' counsel on September 30, 2016, and January 24, 2018; and (3) he would file a motion to reopen the record by February 15, 2018, to introduce those records into evidence.

On February 9, 2018, petitioners filed a Motion for Partial Summary Judgment (petitioners' motion). In that motion, petitioners argued that they are entitled to partial summary judgment with respect to the accuracy-related penalty under section 6662(a) because respondent failed to meet his burden of production, as the record lacked any evidence sufficient to establish the Commissioner's compliance with the section 6751(b)(1) requirement.

On February 9, 2018, respondent filed a Motion to Reopen the Record and the Declaration of Victoria Rex in Support of Motion to Reopen the Record (collectively, respondent's motion).

On February 23, 2018, this Court issued an Order ordering petitioners to file a response to respondent's motion by March 9, 2018. In that Order, the Court also ordered respondent to file a response to petitioners' motion by March 9, 2018.

On March 9, 2018, respondent filed an Objection to Motion for Partial Summary Judgment and the Declaration of Victoria Rex in Support of Objection to Motion for Partial Summary Judgment (respondent's response to petitioners' motion).

On March 9, 2018, petitioners filed an Opposition to Motion to Reopen the Record (petitioners' response to respondent's motion). In that motion, petitioners objected to respondent's motion because: (1) respondent failed to meet his burden of production with respect to the accuracy-related penalty under section 6662(a) because the record lacked any evidence that might establish Commissioner's compliance with the section 6751(b)(1) requirement; (2) respondent failed to satisfy two of the Court's threshold requirements for re-opening the record on motion; and (3) petitioners were not given the opportunity to cross-examine Victoria Rex.

On June 8, 2018, the Court issued an Order affording petitioners the opportunity to serve on respondent a set of interrogatories directed at the contents of respondent's motion on or before June 29, 2018. That order also directed respondent to serve on petitioners, and file with the Court, his answers to such interrogatories or advise the Court as to current status of the case on or before July 30, 2018.

On July 25, 2018, respondent filed a Status Report attaching respondent's answers to petitioners' interrogatories. In that report, respondent advised that the parties have not settled the issue of whether petitioners are liable for the section 6662 penalty for their 2000 taxable year; therefore this issue remains outstanding.

On August 5, 2018, petitioners filed a First Supplement to Motion for Partial Summary Judgment. On August 28, 2018, respondent filed a Reply to First Supplement to Motion for Partial Summary Judgment.

To eliminate any possible prejudice to any of the parties, we will direct the parties to cooperate in developing all facts relevant and necessary to aid this Court in rendering a determination with respect to the application of the section 6751(b)(1) requirement. The parties shall file a report proposing a schedule for further proceedings in this case.

Upon due consideration and for cause, it is

ORDERED that on or before December 4, 2018, the parties shall each file a status report advising the Court if the relevant facts with respect to the section 6751(b)(1) requirement can be resolved by way of: (1) additional discovery, or (2) a supplemental stipulation of facts, or (3) a stipulation of settled issues, and/or (4) whether there is a need for further trial solely as to the issue of the Commissioner's compliance with the section 6751(b)(1) requirement. If there is a need for a further trial then the parties shall also include an estimate of the expected length of trial, and a list of anticipated witnesses and exhibits that they intend to rely on. The Court would appreciate specific references to the issues discussed so the Court can ensure that progress is being made to move this case to either further trial or other resolution.

The parties are advised that the undersigned judge will be presiding at the Court's March 4, 2019, San Francisco, California, trial session. If a further trial is necessary then the Court will calendar such for trial during that trial session.

**(Signed) Joseph W. Nega  
Judge**

Dated: Washington, D.C.  
November 13, 2018