UNITED STATES TAX COURT
WASHINGTON, DC 20217

HISHAM N. ASHKOURI & ANN C. DRAPER,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 17514-15.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

Respondent has moved pursuant to Rule 50 to reopen the record to allow him to admit evidence that he has met the requirements of section 6751(b)(1) in determining penalties under section 6662(a) for petitioners' taxable years 2009 through 2011.[1] Petitioners object.

Background

By a notice of deficiency dated April 16, 2015, respondent determined deficiencies and accuracy-related penalties under section 6662(a) for petitioners' taxable years 2009, 2010, and 2011. We tried this case on February 1, 2017, and it remains under consideration. On December 20, 2017, the Court issued its opinion in Graev v. Commissioner, 149 T.C. 485 (2017) (Graev), and issues addressed in that opinion may affect our consideration of the accuracy-related penalties.

Congress added section 6751 to the Code as part of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, sec. 3306, 112 Stat. at 774 (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

[1]All section references are to the Internal Revenue Code of 1986, as amended (Code) and all Rule references are to the Tax Court Rules of Practice and Procedure.

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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 taken a contrary position, we held in Graev that the Commissioner's burden of production under section 7491(c), which requires him to establish the appropriateness of imposing penalties, includes establishing compliance with the supervisory approval requirement of section 6751(b)(1). Our report in Graev, more than 10 months after the trial in this case, prompted respondent's motion because one of the issues in this case is whether petitioners are liable for section 6662(a) accuracy-related penalties. In Clay & Osceola v. Commissioner, 152 T.C. __, __ (slip op. at 44) (Apr. 24, 2019), we held that the initial determination of a penalty for purposes of section 6751(b)(1) occurs no later than "when * * * proposed adjustments are communicated to the taxpayer formally as part of a communication that advises the taxpayer that penalties will be proposed and giving the taxpayer the right to appeal them with [the Commissioner's] Appeals [office] (via a 30-day letter)".

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. 224, 230 (2018). As we explained in Sarvak v. Commissioner, T.C. Memo. 2018-68, at *20: "We will grant a motion to reopen the record only if the evidence relied on is not merely cumulative or impeaching, is material to the issues involved, and probably would change some aspect of the outcome of the case."

Respondent's motion seeks to reopen the record to receive into evidence declarations of Supervisory Internal Revenue Agents Sandra Colliton and Lynda Diamond. Ms. Diamond's declaration identifies Steven H. Wong as the agent who examined petitioners' returns for the years in issue. Ms. Diamond states that, as of August 15, 2012, Sandra Colliton was Mr. Wong's immediate supervisor. Ms. Diamond further states that, on that date, she acted for Ms. Colliton and, as Mr. Wong's Acting Group Manager, signed a Letter 950 (that is, a 30-day letter) issued to petitioners that enclosed an explanation of adjustments to their income taxes for the years in issue and calculations of accuracy-related penalties under section 6662 for those years. Ms. Diamond's declaration includes as an attachment the Letter 950 and its enclosures. According to Ms. Diamond: "If I sign a 30 day letter that encloses documentation asserting penalties, that means that I approve of my examiner asserting penalties against the taxpayer. I would not sign off on a 30 day letter that includes penalties if I do not think penalties should be asserted."

Ms. Colliton's declaration confirms that, as of August 15, 2012, she was Mr. Wong's immediate supervisor, that she was out of the office on leave on that date, and that she authorized Ms. Diamond to act as manager of her group during her absence. Ms. Colliton's declaration attaches as an exhibit a Form 3198, Special Handling Notice for Examination Case Processing, that lists accuracy-related penalties under section 6662(a) for petitioners' 2009, 2010, and 2011 taxable years. Ms. Colliton states that she signed and initialed the Form 3198 on September 27, 2012.

Petitioners base their opposition to respondent's motion on the transfer of their case to Appeals after Ms. Diamond and Ms. Colliton's involvement in it. Although petitioners do not explicitly address the standards we employ in considering a party's request to reopen the record, they suggest that receipt of the evidence respondent seeks to admit would not affect the outcome of their case because it does not establish compliance with section 6751(b)(1). Petitioners allege that Appeals "amended" their tax liability by reducing their deficiencies "by 50% of what was stated by Ms. Colliton." "This change in tax liability and amount of deficiency," they contend, "amounts to a fundamental change to * * * [what was] proposed by Ms. Colliton." They thus view Appeals' offer of compromise as having "supersede[d]" the 30-day letter.

Contrary to petitioners' argument, the evidence respondent seeks to admit would establish compliance with section 6751(b)(1). The plain terms of that section require the approval of "the initial determination" to assess penalties. Clay & Osceola establishes that the initial determination to assess penalties occurs no later than the issuance of a 30-day letter to the taxpayer. Because a 30-day letter advises a taxpayer of his right to appeal proposed adjustments or penalties, the rule established in Clay & Osceola presupposes the possibility that a taxpayer's case may go "beyond" the examining agent and his immediate supervisor. Neither the statute nor our opinion in Clay & Osceola gives any indication that a determination to assess penalties must receive subsequent approval during consideration of the taxpayer's case by Appeals. (Indeed, as noted above, such a requirement would be contrary to section 6751(b)(1)'s plain language.) Moreover, the compromise offered to petitioners by Appeals did not amount to a "fundamental" redetermination of their tax liabilities for the years in issue. The offer--which the notice of deficiency demonstrates was never implemented--simply reduced each proposed adjustment by approximately half.

Therefore, we conclude that the evidence respondent seeks to introduce is not cumulative or impeaching, is material to the penalty issues in the case, and has the potential to change our decision concerning the penalties by establishing respondent's compliance with section 6751(b)(1). Ms. Diamond's declaration establishes that, acting on Ms. Colliton's behalf, she approved the penalties Mr. Wong proposed when she issued the 30-day letter to petitioners. Her approval was timely under Clay & Osceola. And Ms. Colliton's declaration confirms Ms. Diamond's authority to have acted on her behalf. (By contrast, Ms. Colliton's own approval of the penalties following Ms. Diamond's issuance of the 30-day letter came too late and would not, in its own right, establish compliance with section 6751(b)(1).) We will therefore reopen the record and, because petitioners have advanced no grounds for their exclusion, we will receive into evidence the declarations of Ms. Colliton and Ms. Diamond with their accompanying attachments and find as a fact for purposes of this case that the penalties determined in the notice of deficiency were proposed by Mr. Wong and approved in writing by his immediate supervisor.

It is, therefore,

ORDERED that respondent's motion to reopen the record is granted and the declarations of Ms. Diamond and Ms. Colliton and their accompanying attachments are received into evidence. It is further

ORDERED that the Clerk of the Court shall mark Ms. Diamond's declaration (and attachment) as exhibit 141-R, and Ms. Colliton's declaration (and attachment) as exhibit 142-R. It is further

ORDERED that the record is hereby closed.

(Signed) James S. Halpern
Judge

Dated: Washington, D.C.
May 17, 2019