UNITED STATES TAX COURT
WASHINGTON, DC 20217

AARON G. FILLER,	)	
	)	**BD**
Petitioner,	)	
	)	
v.	)	Docket No. 23581-17.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

This case was tried on December 18, 2018 during the Los Angeles, California Trial Session of the Court. In connection with the trial, the parties submitted to the Court a stipulation of facts which included a civil penalty approval form for a substantial understatement or negligence penalty under section 6662[1] for tax year 2014. Under section 6751(b), such penalties shall not be assessed unless personally approved in writing by the immediate supervisor of the individual making such determination prior to sending the taxpayer an initial determination to assert such penalties. Laura Moody was the revenue agent (RA) assigned to examine petitioner's 2014 return. The record in this case includes a Civil Penalty Approval Form signed by RA Laura Moody's supervisor on April 27, 2017; the Internal Revenue Service (IRS) then issued the notice of deficiency on August 23, 2017. The date in which respondent first formally communicated the penalty asserted as to tax year 2014 at issue in this case is important under the Court's recent decisions.

On April 24, 2019, only days after the final briefs in this case were filed, the Court issued its opinion in Clay v. Commissioner, 152 T.C. 223 (Apr. 24, 2019), where we interpreted section 6751(b)(1) to require that supervisory approval for a penalty be secured no later than (1) the date on which the IRS issues the notice of deficiency or (2) the date, if earlier, on which the IRS formally communicates to the taxpayer the Examination Division's determination to assert a penalty and notifies the taxpayer of his right to appeal that determination. Id. At 249. In Clay,

[1] Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the year in issue.

SERVED Apr 29 2020

the first formal communication took the form of a 30-day letter. We accordingly held that supervisory approval had to be secured before the 30-day letter was issued. Id. At 250.

The record in this case is unclear as to whether petitioner received, prior to the April 27, 2017 supervisory approval date, a 30-day letter or similar communication of an intent to assert a penalty as to tax year 2014 and a right to appeal that penalty.

On April 23, 2020, the Court held a telephonic conference with the parties to discuss the IRS's compliance with the requirements of section 6751(b) in determining the section 6662 penalty asserted in this case. During the conference, respondent asked the Court to consider our recent opinion in Frost v. Commissioner, 154 T.C. _, _ (slip op. at 20) (Jan 7, 2020), where we held that petitioner must first challenge the IRS's penalty determination, then, the Commissioner bears the initial burden of production under section 7491(c) to offer evidence that he has complied with the procedural requirements of section 6751(b), and that once he has satisfied this initial burden the taxpayer must come forward with contrary evidence. The Petition in this case challenges the section 6662 penalty imposed, as does petitioner's brief. However, at that the time this case was tried and briefed neither Clay nor Frost had been decided, and petitioner asserted that he will search his records for evidence that would clarify the issue as to tax year 2014.

We will permit petitioner to file a supplemental brief and include documents he received from the IRS relating to the 2014 penalty issue, and will also allow respondent to reply with any relevant evidence from the Commissioner's files. If necessary, we will open the record to receive the documents into evidence.[2] As to

[2] The decision to reopen the record to admit additional evidence is within our discretion. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 331 (1971); see also Nor-Cal Adjusters v. Commissioner, 503 F.2d 359, 363 (9th Cir. 1974) (the Ninth Circuit does not review our discretion "except upon a demonstration of extraordinary circumstances which reveal a clear abuse of discretion") (citing Friednash v. Commissioner, 209 F.2d 601 (9th Cir. 1954); Chiquita Mining Co. v. Commissioner, 148 F.2d 306 (9th Cir. 1945)), aff'g 30 T.C.M. 837 (1971).

But our discretion is not unbounded. We will not reopen the record unless the evidence that the parties seek to add to the record is not merely cumulative or impeaching, is material to the issues involved, and is likely to change the outcome

either party, the evidence must be relevant to the question whether the IRS had issued to petitioner, before April 27, 2017, when the Civil Penalty Approval Form was signed, a 30-day letter or other written communication that formally communicated the IRS's intent to assert the penalty at issue and afforded petitioner the right to appeal the penalty.

We caution petitioner that this is not an opportunity to readdress IRS approval of his 2014 net operating loss, and that section 6751(b) does not require the IRS to notify taxpayers of the intention to impose a penalty before taxpayers waive their appeal rights. In fact, if petitioner was unaware that the IRS intended to impose a penalty at such time, then that supports respondent's position as to the section 6751(b) issue.

In consideration of the foregoing, it is

ORDERED that, on or before May 26, 2020, petitioner shall file with the Court and serve on respondent a supplemental brief and attach thereto any additional documentation regarding the IRS's issuance of a 30-day letter or other formal written communication sent to petitioner prior to April 27, 2017 regarding the intent to assert the section 6662 penalty against petitioner for the tax year 2014. It is further

---

of the case. Butler v. Commissioner, 114 T.C. 276, 287 (2000), abrogated on other grounds by Porter v. Commissioner, 132 T.C. 203 (2009); see also SEC v. Rogers, 790 F.2d 1450, 1460 (9th Cir. 1986) (trial court "should take into account, in considering a motion to hold open the trial record, the character of the additional [evidence] and the effect of granting the motion"), overruled on other grounds by Pinter v. Dahl, 486 U.S, 622 (1988). And before we grant a motion to reopen the record, we also weigh the Commissioner's diligence (or lack thereof) against any possible prejudice to the taxpayer. See Snuggery-Elvis P'ship v. Commissioner, 64 T.C.M 1128, 1132 (1992) (citing Zenith Radio Corp., 401 U.S. at 332-33; Purex Corp. v. Procter & Gamble Co., 664 F.2d 1105, 1109 (9th Cir. 1981); Mayer v. Higgins, 208 F.2d 781, 783 (2d Cir. 1953); Glagola v. Commissioner, 59 T.C.M. 321 (1990)). As explained above, a formal communication from respondent prior to the date in which the RA obtained supervisory approval would change the outcome of petitioner's case, and there is no prejudice to the parties as the decisions interpreting the section 6751 (b) supervisory approval requirement were decided after the briefs in this case were submitted to the Court.

ORDERED that, on or before June 25, 2020, respondent shall file with the Court and serve on petitioner a reply to petitioner's supplemental brief and attach thereto any additional documentary or factual material that respondent believes relevant to resolution of the penalty approval question.

(Signed) Elizabeth A. Copeland
Judge

Dated: Washington, D.C.
April 28, 2020