UNITED STATES TAX COURT
WASHINGTON, DC 20217

JESUS R. OROPEZA,	)	
	)	
Petitioner(s),	)	
	)	**CT**
v.	)	Docket No. 15309-15.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

This case is currently before the Court on cross-motions for partial summary judgment on the question whether the IRS secured timely written supervisory approval, as required by I.R.C. § 6751(b)(1), for the penalties determined in the notice of deficiency. We find that further briefing from the parties would be helpful in answering this question.

On January 14, 2015, the revenue agent (RA) assigned to this case sent petitioner a Letter 5153 and attached Form 4549-A, Income Tax Discrepancy Adjustments, commonly referred to as a "revenue agent report" (RAR). The RAR asserted a 20% accuracy-related penalty under I.R.C. § 6662(a) "attributable to one or more of the following": (1) negligence or disregard of rules or regulations; (2) substantial understatement of income tax; (3) substantial valuation misstatement; and (4) transaction lacking economic substance. See I.R.C. § 6662(b)(1), (2), (3), (6). The RAR has a space for an increased 40% penalty under I.R.C. § 6662(h), (i), and (j), but states that the "underpayment to which 40% Section 6662 penalty applies" is zero.

On January 29, 2015, the RA's immediate supervisor signed a Civil Penalty Approval form authorizing the assertion of a 20% penalty for substantial understatement of income tax. It did not indicate approval for a 20% penalty on any of the other three grounds and it did not approve any 40% penalty.

On May 1, 2015, the RA and Tyler Pringle, who appears to have been the RA's immediate supervisor, prepared a joint memorandum for IRS Chief Counsel Attorney Brandon Keim. The memorandum, which appears to have been signed

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by both, recommended that the penalty be increased from 20% to 40% under section 6662(i) on the ground that petitioner had engaged in a "nondisclosed noneconomic substance transaction." On May 6, 2015, the IRS issued a notice of deficiency asserting as its primary position a 40% penalty for a "nondisclosed noneconomic substance transaction," referring to it as a "40% section 6662(b)(6) penalty." In the alternative the notice determined a 20% penalty attributable to negligence or substantial understatement of income tax.

Section 6662(a) imposes a 20% penalty on any portion of an underpayment to which the section applies. Subsection (b)(6) states that the penalty shall apply to an underpayment attributable to "[a]ny disallowance of claimed tax benefits by reason of a transaction lacking economic substance." Subsection (i) increases the section 6662(b)(6) penalty from 20% to 40% for any portion of the underpayment "attributable to one or more nondisclosed noneconomic substance transactions."

In light of these facts, the Court would find it helpful to receive additional briefing from the parties. We ask that they assume, for the purpose of argument, that the IRS did not secure timely supervisory approval for the penalty or penalties asserted in the RAR, and then address two questions: (1) Should the RAR be regarded as asserting all four types of 20% penalty, including the 20% penalty for engaging in a noneconomic substance transaction under section 6662(b)(6)? and (2) If the section 6662(b)(6) penalty was asserted in the RAR but not timely approved, can respondent urge that he secured timely approval for a "40% section 6662(b)(6) penalty" under section 6662(i), even though the latter subsection operates only to increase the rate on the base-level section 6662(b)(6) penalty, which by hypothesis was not timely approved?

In consideration of the foregoing, it is

ORDERED that the parties shall submit simultaneous responses to this Order on or before August 7, 2020.

(Signed) Albert G. Lauber
Judge

Dated: Washington, D.C.
July 7, 2020