

UNITED STATES TAX COURT
WASHINGTON, DC 20217 PA

SHEILA ANN SMITH,)
)
Petitioner(s),)
)
v.) Docket No. 1312-16 L.
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent)

ORDER

I. Introduction

This case is before us to review a determination by respondent's Appeals Office (Appeals) sustaining a Notice of Federal Tax Lien (NFTL) that he filed in an effort to collect from petitioner unpaid penalties for filing frivolous tax returns for 2008 through 2011.¹ Section 6320 provides a taxpayer the opportunity for notice and a hearing upon the filing of an NFTL. If a taxpayer requests such a hearing (a collection due process (CDP) hearing), the Settlement Officer (SO) conducting the hearing must verify that the requirements of any applicable law or administrative procedure have been met. Secs. 6320(c), 6330(c)(1).

Section 6751(b)(1) prescribes a rule generally applicable to the assessment of penalties. It provides: "No penalty under this title shall be assessed unless the initial determination of such 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." The frivolous return penalties in this case are provided for in section 6702(a), and the general rule of section 6751(b)(2) applies to the assessment of those penalties. See Kestin v. Commissioner, 154 T.C. 14, 28 (2019). That respondent complied with the rule before he assessed the penalties is among the requirements that the SO Poonam Sharma, the SO who

¹All section references are to the Internal Revenue Code of 1986, as amended.

conducted petitioner's CDP hearing, had to verify. See Rosendale v. Commissioner, T.C. Memo. 2018-99, at *28.

We review an SO's verification of compliance with any applicable law or administrative procedure for abuse of discretion. See e.g., Blackburn v. Commissioner, 150 T.C. 218, 223 (2018). In this case, the scope of our abuse of discretion review is the administrative record.²

Because the record before us is insufficient to determine whether SO Sharma verified compliance with section 6751(b)(1) we will remand this case to Appeals for a supplemental hearing.

II. Stipulated Exhibits

SO Sharma's case activity record is among the documents stipulated to constitute the administrative record in this case. Her case activity record records that she verified from computer transcripts that (1) assessments were properly made for the penalties and years in question, (2) notice and demand for payment were properly mailed to petitioner's last known address, and (3) there was a balance due when the NFTL was requested.

Also stipulated, but not among the documents stipulated to constitute the administrative record in this case, are six Forms 8278, Assessment and Abatement of Miscellaneous Civil Penalties. Respondent has assessed six section 6702(a) penalties of \$5,000 each with respect to six purported income tax returns received from petitioner: two returns for each of 2008 and 2010 and one for each of 2009, and 2011. The six Forms 8278 are: one for each of the two 2008 and two 2010 purported returns and one for each of the 2009 and 2011 purported returns.

²In Robinette v. Commissioner, 123 T.C. 85, 95 (2004), rev'd, 439 F.3d 455 (8th Cir. 2006), we held that "when reviewing for abuse of discretion under sec. 6330(d), we are not limited by the Administrative Procedure Act * * * and our review is not limited to the administrative record." The Court of Appeals for the Ninth Circuit has concluded that, when in a CDP case we review for abuse of discretion, the record rule applies. See Keller v. Commissioner, 568 F.3d 710, 718 (9th Cir. 2009), aff'g in part T.C. Memo. 2006-166, and aff'g in part, rev'g in part decisions in related cases. Under sec. 7482(b)(1)(G), appeal in this case would evidently lie in the Court of Appeals for the Ninth Circuit, and in this case we therefore follow that court's opinion. See Golsen v. Commissioner, 54 T.C. 742, 756-757 (1970), aff'd, 445 F.2d 985 (10th Cir. 1971).

Respondent offers the forms as evidence that "[m]anagement approvals for assertion of the civil penalties at issue * * * were obtained [before assessment of the penalties]". Each form describes a section 6702(a) penalty and, under the heading "Amount Assessed", shows \$5,000. Each form also contains blocks labeled "Originator", "Manager", and "Reviewer".

On three of the forms, the Originator blocks are signed but the signatures (similar) are indecipherable, and the originator is not otherwise identified. On five of the six forms, a printed name appears in the Manager block and the form is signed with that name in the Reviewer block. On one form, the name in the Manager block differs from the signature in the Reviewer block.

III. Discussion

SO Sharma's case activity record evidences that she verified from computer transcripts (1) an assessment of the penalties, (2) notice and demand for payment, and (3) that there was a balance due. Her activity record does not evidence that she verified section 6751(b)(1) compliance. The Forms 8278 are not among the documents stipulated to constitute the administrative record in this case, and, because our abuse-of-discretion review is limited to the administrative record, we do not take them into account in determining whether SO Sharma verified section 6751(b)(1) compliance. Moreover, even were the Forms 8278 among the documents that constitute the administrative record, those forms alone are insufficient to verify section 6751(b)(1) compliance.

The penalty approval requirement in section 6751(b)(1) is particular, allowing assessment of a penalty only if the initial determination of the assessment is personally approved in writing by either "the immediate supervisor" of the individual making the initial determination or a designated higher level official. The Secretary has not designated any higher level official for purposes of section 6751(b). Consequently, the statute requires the written approval of the immediate supervisor of the person making the initial determination. We have held that a Form 8278 is adequate to satisfy the written approval requirement when the form was prepared by the examining agent and signed by the immediate supervisor before assessment of the penalty. See Kestin v. Commissioner, 153 T.C. at 22; Jaxtheimer v. Commissioner, T.C. Memo. 2019-164, at *16.

Nothing on any of the Forms 8278 identifies the individual signing the form in the block labeled "Originator" as the individual making the initial determination of the penalty. However, one of respondent's instructions for preparing a Form

8278 does identify the examiner proposing a penalty as the "originator" of the form. See Internal Revenue Manual (IRM) pt. 20.1.12.8 (2)(I) - Penalties Applicable to Incorrect Appraisals (August 27, 2010). That instruction further provides that the "Group Manager" is to sign and date the form to indicate approval of the penalty. Id. at (2)(j).

Even were we to accept that the Forms 8278 are sufficient to find that (1) each was prepared by the individual making the initial determination of a frivolous return penalty and (2) that determination was approved in writing by the higher level official signing the form, we are still left to ask whether that higher level official--commonly described on all but one those forms as both "Manager" and Reviewer" (seemingly different offices with different duties)--was the "immediate supervisor" of the originator of the form.

The IRM makes the inquiry even more particular. IRM pt. 20.1.1.2.3 (8) - Managerial Approval for Penalty Assessments (11-25-2011) (applicable to the Forms 8278), provides:

IRC 6751(b) provides that the assessment of a penalty shall be approved (in writing) by the immediate supervisor of the individual making the initial determination of such assessment. Generally, an immediate supervisor is the person who writes an employee's evaluation or approves the employee's leave. On-the-job instructors do not qualify as the immediate supervisor for the purpose of IRC 6751(b). [Emphasis added.]

The Forms 8278 are insufficient to find that an individual whose position with respect to originator of the form is either or both of manager and reviewer is the "immediate supervisor" of the form's originator.

When in a CDP case section 6702 penalties have been assessed and the record lacked evidence that the SO had verified compliance with the 6751(b)(1) approval requirements, we have ordered the case remanded for a supplemental hearing during which verification of compliance with section 6751(b)(1) would be obtained and a supplemental determination made. See Vigon v. Commissioner, 149 T.C. 97, 99–100 (2017). We will do likewise here.

IV. Conclusion

It is, therefore

ORDERED that this case is remanded to Appeals for a supplemental hearing to comply with the verification requirements of section 6330(c)(1). It is further

ORDERED that respondent shall offer petitioner a supplemental hearing at the Appeals Office located closest to petitioner's residence (or at such other place as may be mutually agreed upon) at a reasonable and mutually agreed upon date and time, but no later than September 15, 2040. It is further

ORDERED that respondent, on or before October 15, 2020, shall file with the Court any supplemental determination or, if no supplemental determination has yet been made, the parties shall file with the Court a joint report (or, if that is not expedient, then separate reports), explaining the status of the case.

**(Signed) James S. Halpern
Judge**

Dated: Washington, D.C.
July 30, 2020