

UNITED STATES TAX COURT
WASHINGTON, DC 20217

DRC

TRIUMPH MIXED USE INVESTMENTS III,)
LLC, FOX RIDGE INVESTMENTS, LLC, TAX)
MATTERS PARTNER,)
)
Petitioner,)
)
v.) Docket No. 20412-14.
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent)

ORDER

This case is before the Court on the Commissioner’s motion to reopen the record. On June 5, 2014, the Commissioner issued a notice of final partnership administrative adjustment (FPAA) for Triumph Mixed Use Investments III, LLC’s (Triumph) 2010 and 2011 returns. In the FPAA, the Commissioner made adjustments to partnership items and determined an accuracy-related penalty. Fox Ridge Investments, LLC (Fox Ridge), the tax matters partner of Triumph, timely petitioned to dispute the adjustments and the penalty determination. We held a trial on October 25 and 26, 2016. At the conclusion of the trial the evidentiary record was closed.

On December 20, 2017, we issued Graev v. Commissioner, 149 T.C. ___ (Dec. 20, 2017), supplementing 147 T.C. 460 (2016). In Graev, we held that the Commissioner’s burden of production under section 7491(c) includes compliance with the supervisory approval requirement of section 6751(b).¹ On January 18, 2018, we issued an order advising the parties of that opinion and setting a time limit within which the parties could file any motions addressing the application of section 6751(b).

¹ All section references are to the Internal Revenue Code (Code) in effect for the years in issue unless otherwise indicated.

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On February 2, 2018, the Commissioner filed a motion to reopen the record to admit evidence of penalty approval under section 6751(b). In addition to requesting that we reopen the record the Commissioner also argues that he does not bear the burden of production with respect to penalties in this proceeding. Fox Ridge did not object to the motion.

The decision to reopen the record is within the Court's discretion.² "In making its decision to reopen, the court should consider the following factors: (1) the timing of the motion, (2) the nature of the additional evidence, and (3) the potential for prejudice to the nonmoving party."³ We have held that we will not grant a motion to reopen the record unless "the evidence probably would change the outcome of the case."⁴

Section 7491(c) places the burden of production on the Commissioner "in any court proceeding with respect to the liability of any individual for any penalty, addition to tax, or additional amount" imposed under the Internal Revenue Code. In Dynamo v. Commissioner, 150 T.C. __, __ (slip op. at 21) (May 7, 2018), we held that the Commissioner does not bear the burden of production under section 7491(c) in a partnership-level proceeding because it is not a proceeding with respect to the liability of an individual. This is a partnership-level proceeding. Consequently, the Commissioner does not bear the burden of production with respect to penalties.⁵ There is no need to reopen the record to permit the Commissioner to meet a burden that does not fall on him.

That is not the end of our inquiry. If Fox Ridge had challenged supervisory approval, it may have been appropriate for the Court to reopen the record to permit the Commissioner to rebut an argument that he did not obtain the requisite supervisory approval. But Fox Ridge did not challenge supervisory approval before we issued Graev or seek to reopen the record to challenge supervisory

² Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 331 (1971).

³ Skier's Edge Co. v. Ladapa Die & Tool, Inc., 99 F. App'x 848, 850 (10th Cir. 2004).

⁴ Butler v. Commissioner, 114 T.C. 276, 287 (2000).

⁵ Dynamo v. Commissioner, 150 T.C. __, __ (slip op. at 21) (May 7, 2018).

approval after we issued Graev. Thus we need not reopen the record to allow the Commissioner an opportunity to rebut petitioner.

The Commissioner does not bear the burden of production with respect to penalties in this case and petitioner has not challenged whether there was supervisory approval. Granting the motion to reopen the record would not affect the outcome of this case.⁶ Reopening the record in cases where doing so would have no effect on the outcome of the case is a meaningless gesture and a waste of judicial resources.⁷ We therefore decline to reopen the record, and it is

ORDERED, the Commissioner's motion to reopen the record, filed February 2, 2018, is denied.

(Signed) Ronald L. Buch
Judge

Dated: Washington, D.C.
May 7, 2018

⁶ Butler v. Commissioner, 114 T.C. at 287.

⁷ Dynamo v. Commissioner, 150 T.C. __, __ (slip op. at 11) (May 7, 2018).