

**UNITED STATES TAX COURT**  
**WASHINGTON, DC 20217**

DEAN MATTHEW VIGON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 28788-14 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

**ORDER**

This is a “collection due process” (“CDP”) case brought pursuant to section 6330(d), in which petitioner Dean Matthew Vigon challenges the attempt by the Internal Revenue Service (“IRS”) to collect, by means of the filing of a notice of Federal tax lien, \$45,000 (plus interest) in penalties assessed pursuant to section 6702(a) (for “Frivolous Tax Submissions”). Respondent, the Commissioner of the IRS, filed on December 21, 2016, a motion for summary judgment pursuant to Rule 121. (Page citations herein are to pages in that motion and its attachments as they show in the electronically filed document.) Some of the factual predicate for the Commissioner’s motion is not “supported as provided in this rule”, Rule 121(d), sent. 3; and legal argument needed to address patent questions is not given in the motion. We will therefore not require Mr. Vigon to file a response but will deny the motion and will schedule this case for trial in Washington, D.C., the location that Mr. Vigon requested.

**Background**

The Commissioner’s motion shows that Mr. Vigon was assessed nine \$5,000 penalties for the filing of nine frivolous Forms 1041 (“U.S. Income Tax Return for Estates and Trusts”)--two for 2007, three for 2008, and four for 2009. The Commissioner’s motion asserts that “[t]he additional returns filed for each year

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were not amended returns, although some of the returns appear to be duplicates that were mailed to different IRS offices.” (Emphasis added.)

### Amended returns

In fact, on the second 2007 return (Ex. I, p.58), the third 2008 return (Ex. J, p. 64), and the fourth 2009 return (Ex. K, p. 73), the “Amended return” box is checked.

### Duplicates

Consistent with the allegation in the motion as to “duplicates”, three of the supposed returns are unsigned, incomplete photocopies of others: One of the three supposed 2008 returns (Ex. J, p. 63) appears to be an unsigned photocopy of only the first page of one of the other 2008 returns (Ex. J. p. 60). Similarly, two of the four supposed 2009 returns (Ex. K, pp. 69, 70) appear to be unsigned photocopies of only the first page of another of the 2009 returns (Ex. K, p. 65).

### Faxes

The three supposed returns that consist of unsigned photocopies of the first page of another return (one for 2008 and two for 2009) bear headers and notations showing that they were sent to the IRS via telefacsimile and were not mailed.

### Verification of supervisory approval

After the Commissioner previously indicated an intention to move for summary judgment, our order of April 27, 2016, stated, “Presumably, respondent’s motion will undertake to show that the ‘verification’ by the Office of Appeals pursuant to section 6330(c)(1) included a verification of compliance with section 6751(b)(1).” The Commissioner then moved that the case be remanded to the Office of Appeals for a supplemental hearing, because counsel determined that at the initial hearing the Appeals Office “did not verify whether written managerial approval, as set forth in I.R.C. § 6751(b)(1), was obtained before the I.R.C. § 6702 penalties were assessed.”

We granted the motion and remanded the case. In a remand memorandum to Appeals (Ex. P, p. 92), counsel instructed: “The [supplemental] notice [of determination] should identify the person making the determination and his or her immediate supervisor.” In apparent response to this instruction, the Appeals settlement officer noted in her case activity report (Ex. X, p. 112) that the two

Forms 8278 showing approval for 2007 were “signed”, but one with an “illegible signature”. For all of the 2008 and 2009 Forms 8278, the settlement officer noted: “Automated signed by auto signature”. The purported signatures that appear on the Forms 8278 do appear to be facsimile signatures.

The Commissioner’s motion for summary judgment asserts that “before each of the I.R.C. section 6702 penalties was assessed, an immediate supervisor of the individual making the determination to assess the penalty approved that determination in writing”. The Forms 8278 do name an “Originator” on line 10a and a “Reviewer” on line 16. However, not in keeping with the remand memorandum, neither the motion nor any of its attachments (as far as we can tell) identify the person approving the penalty determination as being in fact the immediate supervisor of the individual making the initial determination of the penalty. (Rather, in an email to counsel (Ex. V), the settlement officer observed, “[T]he form 8278 shows a ‘Reviewer’ signature which everyone seems to constitute as a manager signature but it would be better presented in a court situation if the form was changed to notate Manager or Supervisor as the actual person signing the form.”)

## Discussion

### I. Burden of production and proof

The Commissioner does not dispute that Mr. Vigon is eligible to challenge the underlying liability in this CDP case (see sec. 6330(c)(2)(B) or that--because the liability at issue is for penalties--the Commissioner bears at trial the burden of production (see sec. 7491(c)) and the burden of proof (see sec. 6703(a)) on the issue of Mr. Vigon’s liability. In this pretrial context under Rule 121, we look to the Commissioner to make a showing of every element of the case that he must prove at trial.

### II. Filing a return

The particular penalty at issue in this case is imposed by section 6702(a)(1), which provides: “A person shall pay a penalty of \$5,000 if \* \* \* such person files” a frivolous return. Thus, assuming that Mr. Vigon’s documents bear a frivolous position, we evidently need to determine whether they are “return[s]” and whether they were “file[d]”.

Three of the nine documents at issue are not signed returns mailed to the IRS but rather are faxed, unsigned duplicate photocopies of the first page of a return for which the Commissioner already otherwise imposed a penalty. The Commissioner's motion does not explain how these incomplete duplicate papers constitute returns that have been filed.

Moreover, the Commissioner states incorrectly that none of the returns is an amended return, when in fact at least three of them are amended returns. We assume that the Commissioner's deliberate statement must be material (thus, we assume that, for purposes of section 6702(a) liability, the Commissioner thinks it makes a difference whether a return is amended), and we therefore need more information or argument to know whether the penalty can be owing as to these amended returns.

### III. Supervisory approval

Section 6751(b)(1) 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 Secretary has not yet designated any "higher level official" for this purpose, so the statute requires approval by the "immediate supervisor", and not a manager higher up the chain of authority. To show compliance with this provision, the Commissioner must show (1) the identity of the individual who made the "initial determination", (2) an approval "in writing", and (3) the identity of the person giving approval and his or her status as the "immediate supervisor".

The Commissioner sets out none of this in his motion. The Forms 8248 (Exs. R, S, and T) apparently name the individual who made the initial determination (assuming that the "Originator" on line 10a is indeed that person), and all but one of the forms name a "Reviewer". However, we see nothing in the record (apart from general allegations about the penalty determinations as a whole) to support the fact that in each instance the named "Reviewer" was in fact the immediate supervisor (rather than a higher level official). The Commissioner's brief addresses section 6751(b)(1) as involving "managerial approval", but the term "managerial" seems potentially broader than the statutorily required "immediate supervisor" approval. Similarly, the IRS's prescribed Form 8278 does

not use the statutory phrase “immediate supervisor” but rather “Reviewer”. The settlement officer’s observation that “the form 8278 shows a ‘Reviewer’ signature which everyone seems to constitute as a manager signature but it would be better ... if the form was changed to notate Manager or Supervisor” (emphasis added) makes us wonder whether the forms may have been signed by someone who was a Manager but was not the (immediate) Supervisor, i.e., by an unauthorized higher level official instead of the immediate supervisor.

We cannot say that the Commissioner has made a showing that he is entitled to prevail on the issue of Mr. Vigon’s liability for the penalties under section 6702(a). It is therefore

ORDERED that the Commissioner’s motion for summary judgment is denied. It is further

ORDERED that both parties shall file a status report no later than January 6, 2017, stating their availability for trial on Wednesday, February 22, 2017.

**(Signed) David Gustafson**  
**Judge**

Dated: Washington, D.C.  
December 23, 2016