

UNITED STATES TAX COURT

WASHINGTON, DC 20217

ESTATE OF MICHAEL J. JACKSON,)
 Deceased, JOHN G. BRANCA, Co-)
 executor and JOHN MCCLAIN, Co-)
 executor,)
)
) Petitioner(s),)
)
) v.)
)
) COMMISSIONER OF INTERNAL REVENUE,)
)
) Respondent.)

Rm

Docket No. 17152-13.

ORDER

This case was tried at a special session beginning on February 6, 2017. In a phone call on June 14, 2017 the Court spoke with the parties about

- the outstanding promise for a third stipulation of facts;
- the implications in this case of the Second Circuit’s opinion in *Chai v. Commissioner*, 851 F.3d 190 (2d Cir. 2017); and
- various docket entries that remain “locked” to the public but that might not contain material that any party wants “sealed.”

Third Stipulation. There were some housekeeping items at the end of trial that the parties thought might lead to a third stipulation of facts. We specifically held the record open for that, and set a deadline of June 15 for its filing. There is still some toing-and-froing going on between them and we are content to extend the deadline by a couple weeks. The parties are reminded to title the filing accompanying this third stipulation as a “motion to supplement the record.”

Chai, chai v'kayam? Disputes about the breadth of the recent *Chai* opinion, and whether it will triumph over our Court’s *Graev v. Commissioner*, 147 T.C. __

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(Nov. 30, 2016), are very much alive and enduring. In preparing for the trial in this case, the Commissioner apparently produced a copy of the administrative approval of valuation penalties -- that I.R.C. § 6751 may or may not require in a deficiency case -- to petitioner. We say “apparently” because a copy of that form never made it into the record -- not surprising because we had concluded in *Graev* “that the statute imposes no particular deadline for the IRS to secure the required written approval before a penalty is assessed.” *Graev*, 147 T.C. at __ (slip op. at 32).

It is this conclusion that the Second Circuit rejected shortly after the trial of this case. And indeed, not only rejected, but replaced with a holding that “compliance with § 6751(b) is part of the Commissioner’s burden of production and proof in a deficiency case in which a penalty is asserted.” *Chai*, 851 F.3d at 221.

The Commissioner now very much wants this approval form in the record. Petitioner understandably objects. And, unless the parties somehow agree on this question by the time the third stipulation is due, this will call for a motion to reopen the record. The Court will want this motion briefed -- it may end up leading to an opinion.

Unlocking Documents. We noticed recently that a couple docket entries remain unavailable to the public -- “locked” as one says in taxspeak. The first is the second stipulation of facts -- docket entry 79 where it was lodged, and docket entry 120 where it was filed. At the beginning of the trial the parties were unsure if that stipulation contained any information or exhibits that needed to be sealed. Section 7461(a) tells us to open the record as much as possible, so we will set a deadline for the parties to move to seal anything in this stipulation that needs to be sealed.

The second problematic docket entry is 89, which consists of all the exhibits introduced at trial. One of these, exhibit 655-P, was already the subject of a contested motion to seal, and we’ve ruled on that motion. If none of the other exhibits need to be under seal, this docket entry should also be unlocked (after we extract the unredacted version of 655-P to keep it under seal).

To sum up and set deadlines, it is

ORDERED that the parties will move to supplement the record to add a third stipulation of facts on or before June 30, 2017. It is also

ORDERED that any motion to seal any part of the stipulations of facts be filed on or before June 30, 2017. It is also

ORDERED that on or before July 13, 2017 respondent shall file any motion to reopen the record to include evidence relevant to his compliance with I.R.C. § 6751; petitioner shall file a response to this motion on or before August 3, 2017; and respondent may file a reply on or before August 17, 2017. It is also

ORDERED that on or before June 30, 2017, the parties will file a motion to seal portions of docket entries 79, 89, and 120; or file a statement that they agree that these entries may be unlocked.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
June 15, 2017