

UNITED STATES TAX COURT
WASHINGTON, DC 20217

ADRIAN ANTIONETTE MCGEE,)	
)	
Petitioner,)	
)	
v.)	Docket No. 13535-16SL.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

On June 10, 2016, petitioner filed a petition to review the Internal Revenue Service’s (IRS) Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330¹ (notice of determination), sustaining a proposed levy with respect to petitioner’s unpaid tax liability for 2011. On July 22, 2016, respondent filed a Motion for Summary Judgment (motion), pursuant to Rule 121, supported by a declaration submitted by Yurlanda B. Crear, IRS Office of Appeals (Appeals Office) settlement officer (SO Crear). Petitioner objects to the granting of respondent’s motion.² By order dated July 5, 2017, respondent’s motion was assigned for disposition to the undersigned. See sec. 7443A(b)(4), (c).

¹Unless otherwise indicated, all section references are to the Internal Revenue Code, as amended, in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

²Rule 121(a) provides:

* * * [A motion for summary judgment] may be made at any time commencing 30 days after the pleadings are closed but within such time as not to delay the trial, and in any event no later than 60 days before the first day of the Court’s session at which the case is calendared for trial, unless otherwise permitted by the Court. [emphasis added]

In his motion respondent states: “The pleadings in this case were closed on July 5, 2016. This motion is made at least 30 days after the date that the pleadings in this case were closed and within such time as not to delay trial.” Respondent filed the motion on July 22, 2016--less than 30 days after the pleadings in this case were closed. Respondent’s motion was therefore premature. Petitioner does not object to the granting of respondent’s motion on this basis. The

Respondent attached to his motion Form 4340, Certificate of Assessments, Payments, and Other Specified Matters, for petitioner's 2011 tax year, the year at issue in this collection due process case. The Form 4340 indicates that the IRS assessed, among other things, an accuracy-related penalty under section 6662(a) on November 10, 2014. The IRS cannot assess a penalty under section 6662(a) unless it has complied with the requirement of section 6751(b)(1), which 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 notice of determination in this case and the case activity record attached to SO Crear's declaration state that SO Crear verified that the requirements of any applicable law or administrative procedure were met. The Appeals Office settlement officer is required by statute to verify that the requirements of any applicable law or administrative procedure have been met and must do so regardless of whether the taxpayer raised the issue at the CDP hearing. See sec. 6330(c)(1), (3)(A); Hoyle v. Commissioner, 131 T.C. 197, 200-203 (2008). However, the record does not show whether the verification by SO Crear pursuant to section 6330(c)(1) included a verification that the IRS assessed the accuracy-related penalty in conformity with section 6751(b)(1).³ The record also does not include any documentation (such as a copy of Form 8248) to substantiate that the IRS complied with section 6751(b)(1) before assessing the accuracy-related penalty for 2011. To show compliance with this provision, respondent must show (1) the identity of the individual who made the "initial determination", (2) an

Court is hesitant to impose additional filing requirements on the parties and exercises its discretion to allow respondent to proceed with his motion.

³ In Graev v. Commissioner, 147 T.C. ___, ___ (slip. op. at 39) (Nov. 30, 2016), the Court held that the taxpayers' argument in a deficiency case that the Commissioner failed to comply with sec. 6751(b)(1) was premature because the Commissioner had not yet assessed a sec. 6662(a) penalty. However, the Court stated: "We do not foreclose the possibility that a taxpayer who believes that a penalty has been assessed in violation of sec. 6751(b)(1) might raise this issue in a postassessment collection due process (CDP) proceeding." Graev v. Commissioner, 147 T.C. at (slip. op. at 39 n. 22) (citing section 6320(c), 6330(c)(1) which requires that the settlement officer in a CDP hearing obtain verification that the requirements of any applicable law or administrative procedure have been met).

approval “in writing”, and (3) the identity of the person giving approval and his or her status as the “immediate supervisor”. See sec. 6751(b)(1).

If respondent wishes to pursue summary judgment as to the entirety of this case, he shall file a supplemental memorandum in support of his motion including a declaration that attaches any relevant documents. If respondent believes that SO Crear was not required to verify compliance with section 6751(b)(1)--e.g., in light of the exception in section 6751(b)(2) (“paragraph (1) shall not apply to * * * any other penalty automatically calculated through electronic means”)--he shall set forth those arguments in his supplemental memorandum. But see Graev v. Commissioner, 147 T.C. at ____ (slip. op. at 27 n.10) (“The definition of a sec. 6662(b)(2) ‘substantial understatement of income tax’ goes beyond mere calculation.”). Alternatively, if respondent concludes that the accuracy-related penalty was not properly assessed, he should consider abating that penalty, in which case the Court will consider the motion as it applies to the balance of the unpaid tax liability for 2011.

Upon due consideration of the foregoing, it is

ORDERED that, on or before August 15, 2017, respondent shall file a supplement to his motion for summary judgment as described above. It is further

ORDERED that, on or before August 30, 2017, petitioner may file, if she wishes, a reply to respondent’s supplement to his motion for summary judgment.

(Signed) Diana L. Leyden
Special Trial Judge

Dated: Washington, D.C.
August 1, 2017