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

| | | |
|---|---|---|
| COREY V. TRIGGS, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | Docket No. 14824-16S. |
| | ) | |
| COMMISSIONER OF INTERNAL REVENUE, | ) | |
| | ) | |
| Respondent | ) | |
| | ) | |

**ORDER**

This case was tried on November 6, 2017, in San Francisco, California. In light of the Court's opinion in Graev v. Commissioner, 149 T.C. No. 23 (Dec. 20, 2017), by order dated March 16, 2018, the Court directed that respondent could move to reopen the record to provide evidence of compliance by the Internal Revenue Service (IRS) with section 6751(b)[1] with respect to the accuracy-related penalty under section 6662(a) for negligence or for a substantial understatement of tax at issue in this case.

On March 30, 2018, respondent filed a Motion to Reopen the Record (motion) and lodged with the Court a declaration by Emily Harris, paralegal specialist in the Office of Chief Counsel of the IRS. In the motion respondent asks the Court to reopen the record in this case to admit Ms. Harris' declaration, which includes as an attachment a copy of the AMDISA transcript for petitioner for 2013.

In his motion respondent asserts that although section 6751(b)(1) requires managerial approval before a section 6662(a) penalty is assessed:

> I.R.C. §6751(b)(2)(B) provides an exception to this rule for penalties that are automatically calculated via electronic means. If the taxpayer does not respond to the Correspondence Examination, the system

[1]Unless otherwise indicated, all section references are to the Internal Revenue Code, as amended, in effect at all relevant times.

> automatically asserts additions to tax and penalties without any human considering the appropriateness of the penalty.

According to respondent, Ms. Harris' declaration and the copy of the AMDISA transcript attached to her declaration demonstrate that the section 6751(b)(2)(B) exception applies in this case because petitioner was unresponsive to the IRS' correspondence during the examination process before the notice of deficiency in this case was issued.

The Internal Revenue Manual (IRM)[2] explains:

> Penalty automatically calculated through electronic means encompasses something more than merely an electronic device to perform arithmetic functions to determine the amount of a penalty. Instead, the assessment of a penalty qualifies as one calculated through electronic means if the penalty is assessed free of any independent determination by an IRS employee as to whether the penalty should be imposed against a taxpayer.

IRM pt. 20.1.1.2.3(5) (Aug. 5, 2014); see, e.g., Graev v. Commissioner, 147 T.C. No. 16 n.10 (Nov. 30, 2016). The IRM also explains:

> (a.) When IRC 6662 accuracy-related penalties for negligence and substantial understatement are assessed under the Automated Underreporter (AUR) program without an employee independently determining the appropriateness of the penalty, then the penalty is one that is automatically calculated through electronic means and may be assessed without written supervisory approval.
>
> (b.) However, if a taxpayer responds either to the initial letter proposing a penalty or to the notice of deficiency that the program automatically issues, an IRS employee will have to consider the taxpayer's response. Therefore, the IRS employee will have to make an independent determination as to whether the response provides a basis upon which the taxpayer may avoid the penalty. The employee's independent determination of whether the penalty is appropriate means the penalty is not automatically calculated through electronic

[2]Unless otherwise noted, the Court cites the IRM provisions as in effect at the time of the relevant agency action.

> means. Accordingly, IRC 6751(b)(1) requires managerial written approval of an employee's determination to assert the penalty.

IRM pt. 20.1.5.1.6(9) (Jan. 24, 2012) (emphasis added); see also IRM pt. 4.19.3.2.1.4(2) and (3) (Sept. 1, 2012).

The accuracy-related penalty under section 6662(a) for 2013 in this case was not asserted by the IRS under the AUR program. Nevertheless, in the motion respondent asserts that if a taxpayer does not respond to a correspondence examination, the penalty is automatically asserted.

With respect to correspondence examinations, one provision of the IRM states: "The determination to assert penalties, to identify the appropriate penalties, and to calculate the penalty amount accurately is primarily the examiner's responsibility. This responsibility remains the same even when examinations are conducted by correspondence." IRM pt. 4.10.3.16.8 (Mar. 1, 2003). The IRM also states that "[t]he application of appropriate penalties is required to be considered during all examinations." IRM pt. 4.19.13.2.5(2) (Jan. 1, 2012). Another IRM provision states:

> For Wage and Investment (W&I) and SB/SE campus cases, written managerial approval and non-assertions may be documented on Form 4700. On Correspondence Examination Automation Support (CEAS) cases, the manager must input a Report Generation Software (RGS)/CEAS non-action notation to indicate concurrence with the penalty assertion.

IRM pt. 20.1.5.1.6(6) (Jan. 24, 2012).

The Court directs respondent to file a supplement to his motion explaining respondent's legal basis for the contention that the assertion of a section 6662(a) accuracy-related penalty does not require managerial approval under the exception in section 6751(b)(2)(B) because the taxpayer's lack of response to a correspondence examination before the notice of deficiency is issued gives rise to a penalty automatically calculated through electronic means. Respondent should include a discussion as to the application of the above discussed IRM provisions.

For cause, it is

ORDERED that, on or before May 31, 2018, respondent shall file supplement to the motion to reopen the record as described above.

**(Signed) Diana L. Leyden**
**Special Trial Judge**

Dated: Washington, D.C.
April 4, 2018