

original filing for which respondent claims he possesses no record of receiving (2). Additionally, petitioner submitted an original Form 1040X, Amended U.S. Individual Tax Return, for 2009. In total, six discrete submissions were received by respondent in 2012.

Following initial review of these submissions, respondent sent to petitioner for each of the years in issue Letters 3176C, which warned her that her submission for the corresponding year claimed one or more frivolous positions subject to a penalty under section 6702. Moreover, these letters instructed petitioner to submit corrected returns within 30 days to avoid imposition of the penalty.

Petitioner did not make any corrected returns in response to these letters within the 30-day period. Consequently, after written supervisory approvals were obtained on six separate Forms 8278, Assessment and Abatement of Miscellaneous Civil Penalties, respondent assessed a \$5,000 penalty for each of the six return submissions pursuant to section 6702. Respondent's demand for payment of the liability bore no fruit. Resultantly, he filed a Notice of Federal Tax Lien (NFTL) in February 2015 and sent petitioner a Letter 3172 informing her of the filing and her right to a CDP hearing under section 6320. Petitioner timely filed a Form 12153, Request for a Collection Due Process or Equivalent Hearing, to challenge the lien. Following the hearing (conducted by correspondence), Appeals issued a Notice of Determination sustaining the NFTL from which the present case arises.

We held trial in May 2017 and received seriatim briefs from the parties in the fall the same year. In July 2019, pending our decision in this case, petitioner filed a motion to compel discovery (motion) requesting that we order respondent "to provide evidence that proper approval was made related to all § 6702 penalties that have been asserted upon Petitioner, showing that an Immediate Supervisor approved them in writing prior to penalties being asserted upon Petitioner."

Discussion

Under section 6751(b)(1), no penalty may be assessed against a taxpayer 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." Compliance with section 6751(b)(1) is part of respondent's burden of production. See secs. 6751(b)(1), (2)(A), 7491(c); Graev v. Commissioner, 149 T.C. 485, 492-493 (2017), supplementing and overruling in part 147 T.C. 460 (2016).

There is the question of by when such supervisory approval must be obtained. In Chai v. Commissioner, 851 F.3d 190, 221 (2d Cir. 2017), aff'g in part and rev'g in part, T.C. Memo. 2015-42, the Court of Appeals held "that § 6751(b)(1) requires written approval of the initial penalty determination no later than the date the IRS issues the notice of deficiency (or files an answer or amended answer) asserting such penalty."

In Palmolive Bldg. Invr's, LLC v. Commissioner, 152 T.C. __, __ (Feb. 28, 2019) (slip op. at 22-23), a partnership case, we analogized a Final Partnership Administrative Adjustment to a notice of deficiency and appeared to accept the Second Circuit's view in Chai that supervisory approval at any time before issuance of a notice of deficiency would be timely.

In Clay v. Commissioner, 152 T.C. __ (Apr. 24, 2019), the penalties in issue were approved by the appropriate supervisor before issuance of the notice of deficiency but after the taxpayers were sent a Revenue Agent's report (RAR) proposing the penalties accompanied by a 30-day letter (giving appeal rights to the taxpayers). We concluded that the initial determination of the penalties was made no later when the Revenue Agent sent the RAR and 30-day letter to the taxpayers and that supervisory approval after that date was not timely. Id. (slip op. at 45).

In Kestin v. Commissioner, 153 T.C. __ (August 29, 2019), the taxpayer submitted to the IRS a frivolous amended return. The IRS sent the taxpayer a Letter 3176C stating that the position on her amended return was frivolous and inviting her to avoid a penalty under section 6702(a)(1) by correcting her frivolous filing. The taxpayer did not comply, and, after administrative approval was obtained, the IRS assessed the penalty. We held that the Letter 3176C was not an "initial determination" of penalty for purposes of section 6751(b)(1), id. at 26, and that the required approval of the penalty was obtained before the penalty was assessed.

Petitioner is correct in raising the relevance of the section 6751(b)(1) written supervisory approval requirement for penalties. Her motion is unwarranted, however, as the evidence that she seeks is presently in the record. She may find respondent's citations to the record in his opening seriatim brief particularly helpful in that regard. But because briefing in this case concluded before the recent developments in our case law concerning by when supervisory approval of penalties must be obtained. We wish to extend to the parties the opportunity for additional briefing addressing whether the supervisory approvals of the six section 6702 penalties assessed in this case were timely.

On the premises stated, it is

ORDERED that, on or before September 13, 2019, either party may file a supplemental brief addressing whether the supervisory approvals of the six section 6702 penalties assessed in this case were timely. It is further

ORDERED that petitioner's motion is denied as moot.

**(Signed) James S. Halpern
Judge**

Dated: Washington, D.C.
August 30, 2019