

US TAX COURT
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US TAX COURT
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MAR 24 2017

LAWRENCE G. GRAEV & LORNA GRAEV,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

ELECTRONICALLY FILED

Docket No. 30638-08

RESPONDENT'S MOTION TO VACATE DECISION

UNITED STATES TAX COURT

LAWRENCE G. GRAEV & LORNA GRAEV,)
)
 Petitioner,)
)
 v.) Docket No. 30638-08
)
 COMMISSIONER OF INTERNAL REVENUE,) JUDGE MICHAEL B. THORNTON
)
 Respondent.) FILED ELECTRONICALLY

MOTION TO VACATE DECISION

RESPONDENT MOVES that the Court vacate the decision entered in this case.

IN SUPPORT THEREOF, respondent alleges as follows:

1. Attached hereto as Exhibit A is a copy of the decision entered on March 7, 2017.

2. Tax Court Rule 162 allows a party to file a motion to vacate or revise a decision within 30 days after the decision has been entered. The disposition of a motion to vacate or revise a decision lies within the sound discretion of the court. See Vaughn v. Commissioner, 87 T.C. 164, 166-167 (1986).

3. Although Rule 162 does not provide any standard for evaluating a motion to vacate or revision a decision, the court

has often referred to Federal Rule of Civil Procedure (FRCP) 60 and cases applying FRCP 60 to assist in resolving those motions. See Cinema '84, Richard M. Greenberg, Tax Matters Partner v. Commissioner, 122 T.C. 264, 267-268 (2004), aff'd 412 F.3d 366 (2d Cir. 2005); Brannon's of Shawnee, Inc. v. Commissioner, 69 T.C. 999, 1001 (1978).

4. Grounds for relief under FRCP 60 include "any other reason that justifies relief." FRCP 60(b)(6). In the Court of Appeals for the Second Circuit, relief under FRCP 60(b)(6) generally requires a showing of "exceptional circumstances." Ruotolo v. City of New York, 514 F.3d 184, 191 (2d Cir. 2008).

5. Relief is justified here because a recent decision by the United States Court of Appeals for the Second Circuit created "exceptional circumstances" for this case.

6. On March 20, 2017, the United States Court of Appeals for the Second Circuit released an opinion in Chai v. Commissioner, No. 15-1653 (2d Cir. Mar. 20, 2017).

7. The Second Circuit's opinion in Chai specifically disagreed with the majority opinion in this case. Chai, *slip op.* at *57, 59.

8. The court in Chai held that compliance with section 6751(b) is an issue in deficiency cases because it is part of

respondent's burden of production for penalties under section 7491(c). Chai, *slip op.* at *67.

9. Because an appeal in this case would be heard by the Second Circuit, the majority's opinion in this case cannot be upheld under the precedent established by Chai.

10. Respondent requests that the Court vacate its decision in this case and order additional briefing on what steps the Court should take in this case in light of the Chai opinion. Respondent has views which it believes will benefit the Court to consider in the changed circumstances of this case.

11. On March 23, 2017, counsel for petitioners advised respondent that there is no objection to the granting of this motion.


WHEREFORE, respondent requests that this motion be granted.

WILLIAM M. PAUL
Acting Chief Counsel
Internal Revenue Service

Date: _____

MAR 24 2017

By: _____


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Rule 155 Thornton

RS

UNITED STATES TAX COURT

LAWRENCE G. GRAEV &)	
LORNA GRAEV,)	
)	
Petitioners,)	
)	
v.)	Docket No. 30638-08
)	
COMMISSIONER OF INTERNAL REVENUE,)	JUDGE MICHAEL B. THORTON
)	
Respondent.)	

DECISION

Pursuant to the opinion of the Court filed November 30, 2016, and incorporating herein the facts recited in respondent's computation as the findings of the Court, it is

ORDERED AND DECIDED: That there are deficiencies in income tax due from petitioners for the taxable years 2004 and 2005 in the amounts of \$212,827.00 and \$155,943.00, respectively;

That there are no penalties due from petitioners for the taxable years 2004 and 2005, under the provisions of I.R.C. § 6662(h); and

That there are penalties due from petitioners for the taxable years 2004 and 2005, under the provisions of I.R.C. § 6662(a), in the amounts of \$42,565.40 and \$31,188.60, respectively.

(Signed) Michael B. Thornton
Judge

Entered: MAR -7 2017

* * * * *

Exhibit No. A
Docket No. 30638-08

SERVED MAR -7 2017

The parties stipulate that the foregoing decision is in accordance with the opinion of the Court and respondent's computation, and that the Court may enter this decision, without prejudice to the right of either party to contest the correctness of the decision entered herein.

WILLIAM M. PAUL
Acting Chief Counsel
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Date: 02/28/17