

UNITED STATES TAX COURT  
WASHINGTON, DC 20217 PA

CHRISTOPHER JOHN TOTTEN, )  
)  
Petitioner, )  
)  
v. ) Docket No. 10691-14S.  
)  
COMMISSIONER OF INTERNAL )  
REVENUE, )  
)  
Respondent. )

**ORDER**

This case was called for trial from the Trial Session of the Court at Tampa, Florida on May 3, 2016, and the case remains under consideration by the Court. On December 20, 2017, the Court issued its opinion in Graev v. Commissioner, 149 T.C. No. 23 (December 20, 2017) (Graev III),<sup>1</sup> and issues addressed in that opinion may affect this case. This order sets a limited time for the parties to make any motions they deem appropriate in the light of Graev III.

Congress added section 6751 as part of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, sec. 3306, 112 Stat 685, 744 (RRA'98). It is effective for notices issued after December 31, 2000. Sec. 3306(c). Section 6751(b)(1) 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.

Until recently, there had been little litigation over the effect of section 6751(b). We will address the recent litigation chronologically.

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<sup>1</sup>We use Graev to refer generally to Graev v. Commissioner, Docket No. 30638-08. We use Graev II and Graev III to refer to specific opinions discussed in this order. Other than this footnote, we do not refer to an earlier opinion in Graev, 140 T.C. 377 (2013) (Graev I).

The earliest case of note<sup>2</sup> is Chai v. Commissioner, T.C. Memo. 2015-42, aff'd in part, rev'd in part, 851 F.3d 190 (2nd Cir. 2017). In that case, the taxpayer did not raise any questions regarding the application of section 6751(b) until he submitted his post-trial brief. Chai stands for the proposition: “A party may not raise an issue for the first time on brief if the Court’s consideration of the issue would surprise and prejudice the opposing party.” Chai v. Commissioner, T.C. Memo. 2015-42, at \*25.

Our first case to address section 6751(b) where supervisory approval was required was Legg v. Commissioner, 145 T.C. 344 (2015). In that case, the taxpayer challenged the application of a 40% gross valuation misstatement penalty, alleging that the Commissioner failed to get supervisory approval of the initial determination as required by section 6751(b). On the facts of that case, we held that the requirement for supervisory approval was satisfied. We did not need to reach the issue of when approval must occur, because the penalty was approved as part of the examination report. We expressly left open the question of when supervisory approval was required. Id. at 349.

Then came Graev v. Commissioner, 147 T.C. No. 16 (November 30, 2016) (Graev II). In Graev II, the Court split on the question left open by Legg: when supervisory approval of a penalty determination is required. A majority of the Court held that the question of whether the requisite supervisory approval was obtained was premature because the tax had not yet been assessed. In effect, the majority held that supervisory approval could occur at any time before assessment. The dissenters argued not only that the issue of supervisory approval was ripe for consideration, but that demonstrating supervisory approval was part of the Commissioner’s burden of production. See Graev II, slip op. at 76; see also sec. 7491(c).

That dissent figured prominently in the Court of Appeals for the Second Circuit’s reversal of Chai. See Chai v. Commissioner, 851 F.3d 190, 216-220 (2nd Cir. 2017), aff'g in part, rev'g in part, T.C. Memo. 2015-42. On March 20, 2017, the Second Circuit reversed Chai specifically on the issue of the application of section 6751(b). In addition to quoting extensively from the Graev II dissent, the

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<sup>2</sup>Although there were earlier cases that addressed sec. 6751(b), they principally dealt with penalties that were automatically calculated through electronic means; thus, the issue of supervisory approval was immaterial. See, e.g., Grace Foundation v. Commissioner, T.C. Memo. 2014-229, at \*14; see also sec. 6751(b)(2).

Second Circuit 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 that vein, we further hold 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.” Id. at 221.

When the Second Circuit issued its opinion in Chai, the decision in Graev was not yet final. On March 24, 2017, the Commissioner moved to vacate the decision in Graev to allow for supplemental briefing regarding section 6751(b). The Court granted the motion, and on December 20, 2017, the Court issued Graev III. Consistent with the Court of Appeals for the Second Circuit,<sup>3</sup> we held that the Commissioner’s burden of production under section 7491(c) includes establishing compliance with the supervisory approval requirement of section 6751(b). See Graev III, slip op. at 14.

The question before us is how Graev III might affect this case. In this regard, the following timeline may be helpful:

- Section 6751 enacted (July 22, 1998)
- Section 6751 effective (notices issued after December 31, 2000)
- Chai v. Commissioner, T.C. Memo. 2015-42 (March 11, 2015)
- Legg v. Commissioner, 145 T.C. 344 (December 7, 2015)
- Totten v. Commissioner, Trial Held (May 3, 2016)
- Totten v. Commissioner, Evidentiary Record Closed (May 25, 2016)
- Totten v. Commissioner, Briefing Completed (October 5, 2016)
- Graev v. Commissioner, 146 T. C. No. 16 (November 30, 2016)
- Chai v. Commissioner, 851 F.3d 190 (2nd Cir. March 20, 2017)
- Graev v. Commissioner, 149 T.C. No. 23 (December 20, 2017)

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<sup>3</sup>Graev is appealable to the Second Circuit, which decided Chai. However in deciding Graev, we did not rely on Golsen v. Commissioner, 54 T.C. 742 (1970). No other circuit has addressed the application of section 6751(b); thus at this time, our holding in Graev III applies regardless of the circuit to which any particular case may be appealable.

To assist the Court in addressing this issue, it is hereby

ORDERED that respondent shall, or before January 9, 2018, file a response to this Order addressing the effect of section 6751(b) on this case and directing the Court to any evidence of section 6751(b) supervisory approval that is in the record of this case. It is further

ORDERED that petitioner may, on or before January 16, 2018, file a response to this Order addressing the effect of section 6751(b) on this case. It is further

ORDERED that any motion addressing the application of section 6751(b) on this case shall be filed on or before January 23, 2018. The parties are reminded that any such “motion shall show that prior notice thereof has been given to each other party or counsel for each other party and shall state whether there is any objection to the motion.” Rule 50(a), Tax Court Rules of Practice and Procedure.

**(Signed) Tamara W. Ashford  
Judge**

Dated: Washington, D.C.  
December 26, 2017