

UNITED STATES TAX COURT
WASHINGTON, DC 20217

PA

ESTATE OF MICHAEL J. JACKSON,)
DECEASED, JOHN G. BRANCA, CO-)
EXECUTOR AND JOHN MCCLAIN, CO-)
EXECUTOR,)

Petitioner(s),)

v.)

Docket No. 17152-13.

COMMISSIONER OF INTERNAL REVENUE,)

Respondent)

ORDER

This case was tried at a special session beginning on February 6, 2017, and the posttrial briefing runs into later this year. Since the completion of the trial, the Court released *Graev v. Commissioner*, 149 T.C. ___, ___ (Dec. 20, 2017) (*Graev III*) (slip op. at 14), which held that (1) compliance with I.R.C. § 6751(b) is properly at issue in a deficiency case, and (2) such compliance is part of the Commissioner’s burden of production under I.R.C. § 7491(c). This division of the Court then followed up with an order that denied the Commissioner’s motion to reopen the record to introduce additional evidence on that point.

The Court’s resolution of both of these issues may well be reviewed on appeal in this or other cases. The Court has learned of an additional consequence of *Graev III* that might be lurking in this case. Consider the language of the following sections:

§ 6751(b)(1) - “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”;

§ 7491(c) - “[T]he Secretary shall have the burden of production in any court proceeding with respect to the liability of any *individual* for any penalty, addition to tax, or additional amount imposed by this title”; and

§ 7701(a)(1) - “The term ‘person’ shall be construed to mean and include an *individual*, a trust, *estate*, partnership, association, company or corporation.”

(Emphases added).

The parties may wish to brief the issue of whether the Court’s ruling in *Graev III* that § 6751(b) compliance is part of the Commissioner’s burden of production extends to cases where the petitioner is a taxpayer but is *not* an individual. They should note that the Court traditionally applies § 7491(c) in estate tax cases, *see, e.g., Estate of Richmond v. Commissioner*, 107 T.C.M. 1135, 1145-46 (2014) (Commissioner bears burden of production on § 6662 penalty); *Estate of Giovacchini v. Commissioner*, 105 T.C.M. 1179, 1186 (2013) (Commissioner has burden of production on penalties), though we’ve never said why, *see, e.g., Estate of Rector v. Commissioner*, 94 T.C.M. 567, 574 n.11 (2007) (not deciding if § 7491(c) applies to estate because record sufficient to meet any burden of production); *Estate of Hartsell v. Commissioner*, 88 T.C.M. 267, 269 n.6 (2004) (only assuming § 7491(c) applies because Commissioner met any burden of production).

It is therefore

ORDERED that in their briefs due later this year, the parties state whether they wish to address this issue and, if they do, what their positions are.

**(Signed) Mark V. Holmes
Judge**

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