

Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided.

UNITED STATES TAX COURT
WASHINGTON, DC 20217

OAKBROOK LAND HOLDINGS, LLC,)
WILLIAM DUANE HORTON, TAX)
MATTERS PARTNER,)

Petitioner(s),)

ALS

v.)

Docket No. 5444-13.

COMMISSIONER OF INTERNAL REVENUE,)

Respondent)

ORDER

This case was tried at a special session in October 2016, and the parties completed their posttrial briefing almost a year ago. Since then, 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 *Chai* ghoul -- a TEFRA *Chai* ghoul -- which might also 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

SERVED Jan 05 2018

§ 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 how the Court’s ruling in *Graev III* that § 6751(b) compliance is part of the Commissioner’s burden of production affects TEFRA cases. (The petitioner in a TEFRA case is the partner who files the petition, *Chef’s Choice Produce, Ltd. v. Commissioner*, 95 T.C. 388, 395 (1990), who is an individual here.) They should note that the Court has applied § 7491(c) in at least one TEFRA case, though that case showed that the caselaw might be of less than crystalline clarity. *See Seismic Support Servs., LLC v. Commissioner*, 107 T.C.M. 1405, 1407, n.11 (2014) (explaining that § 7491(c) refers only to *individual* liability for penalties but our Court sometimes applies it to taxpayers who aren’t individuals). And, of course, in a TEFRA case the only penalty issue is the *applicability* of the penalty, not the *liability* for the penalty. *See United States v. Woods*, 571 U.S. ___, ___, 134 S. Ct. 557, 564 (2013).

It is therefore

ORDERED that, if the parties wish to address this issue, they should file supplements to their posttrial briefs explaining their positions on or before February 5, 2018. The Court suspects that the consequences of *Graev III* may require some coordination on respondent’s part with other sections of the IRS, so it is also

ORDERED that the parties may by stipulation filed with the Court extend this supplemental-briefing deadline.

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

Dated: Washington, D.C.
January 5, 2018