

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

HISHAM N. ASHKOURI & ANN C. DRAPER, )  
 )  
 Petitioner(s), )  
 )  
 v. ) Docket No. 17514-15.  
 )  
 COMMISSIONER OF INTERNAL REVENUE, )  
 )  
 Respondent )

**ORDER**

This case was tried on February 1, 2017, and 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 light of the Court's opinion in Graev III. Except as otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended.

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. It is effective for notices issued after December 31, 2000. Sec. 3306(c). Section 6751(b) 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.

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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).

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

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 (2d Cir. 2017). In that case, Mr. Chai did not raise any question 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 or 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 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. 460 (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, 147 T.C. at 507; 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 (2d

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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 Found. v. Commissioner, T.C. Memo. 2014-229, at \*14; see also sec. 6751(b)(2).

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 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 its latest opinion in Graev. 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).

The question before us is how Graev III may affect this case. In this regard, a 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)
- Graev v. Commissioner, 147 T.C. 460 (November 30, 2016)
- Ashkouri & Draper v. Commissioner, Trial Held (February 1, 2017)
- Chai v. Commissioner, 851 F.3d 190 (2d Cir. March 20, 2017)
- Ashkouri & Draper v. Commissioner, Briefing Completed (June 28, 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 sec. 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

ORDERED that respondent shall file a response to this Order by April 9, 2019, 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 file a response to this Order by April 16, 2019, 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 by April 23, 2019. 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 & Procedure.

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

Dated: Washington, D.C.  
March 26, 2019