

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

NATHANIEL A. CARTER & STELLA C.)	
CARTER, ET AL.,)	CZ
)	
Petitioners,)	
)	
v.)	Docket No. 23621-15,
)	23647-15.
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	
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ORDER

In a teleconference on June 25, 2019, the Court discussed with the parties the implications for the present cases of our recent opinion in Clay & Osceola v. Commissioner, 152 T.C. __ (April 24, 2019), concerning the timeliness of the supervisory approval of penalties required by section 6751(b)(1).¹ That section 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." As explained below, the jurisprudence on just when the supervisory approval required by section 6751(b)(1) must be received has evolved over the past several years, with several important developments having occurred only after our trial of the present cases in April 2017.

¹All section references are to the Internal Revenue Code of 1986, as amended.

In Graev v. Commissioner, 147 T.C. 460 (2016) (Graev II),² a majority of the Court held that, because the supervisory approval required by section 6751(b)(1) could occur at any time before assessment, it would be premature to consider compliance with that requirement in a deficiency proceeding. In an opinion issued in March 2017, shortly before our trial of the present cases, the Court of Appeals for the Second Circuit took a position contrary to the one we adopted in Graev II. See Chai v. Commissioner, 851 F.3d 190 (2d Cir. 2017), aff'g in part, rev'g in part T.C. Memo. 2015-42. In Chai v. Commissioner, 851 F.3d at 221, the appeals court 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."

When the Second Circuit issued its opinion in Chai, the decision in Graev had not yet become final. The Commissioner thus moved to vacate the decision in Graev to allow for supplemental briefing regarding section 6751(b). We granted the motion and, in a supplemental opinion issued in December 2017, "revers[ed] those portions of Graev II which held that it was premature to consider section 6751(b) issues in * * * [a] deficiency proceeding." Graev v. Commissioner, 149 T.C. 485, 493 (2017) (Graev III). Thus, in Graev III, issued eight months after our trial of the present cases, we held for the first time that establishing compliance with section 6751(b) is part of the burden of production in regard to penalties imposed on the Commissioner by section 7491(c).

In light of Graev III, in an order issued in September 2018, we reopened the record in the present cases to allow respondent to offer evidence concerning his compliance with section 6751(b)(1). In a stipulation submitted the following November, the parties identified respondent's examiner Christopher Dickerson as the individual who initially determined that accuracy-related penalties under section 6662 should be asserted in these cases. The parties further stipulated that Donald Maclennan approved those penalties in writing on May 19, 2015, when he was Mr. Dickerson's immediate supervisor. The record does not establish when Mr. Dickerson made his determination to assert penalties, but an activity record for Mr. Dickerson that the parties submitted with their stipulation indicates that he sent

²We use Graev to refer generally to Graev v. Commissioner, docket No. 30638-08. We refer to the opinion issued in 2016 as Graev II because it was predated by an earlier opinion, reported at 140 T.C. 377 (2013), which is not relevant to the matters addressed in this Order.

a report of proposed adjustments to the taxpayers and their representatives on May 8, 2015.

In Clay & Osceola, issued five months after the parties' stipulation concerning Mr. Maclennan's approval of the penalties at issue in these cases, we considered a challenge to the timeliness of a supervisor's approval of penalties. While Chai established that penalties must receive supervisory approval no later than the Commissioner's issuance of a notice of deficiency, it left open the possibility that the deadline for the required approval might be earlier. In Clay & Osceola v. Commissioner, 152 T.C. at ___ (slip op. at 42), we faced the question of "whether approval can come after the agent sends the taxpayer proposed adjustments that include penalties." We concluded that section 6751(b)(1) requires written approval of penalties no later than the issuance to the taxpayer of a formal communication of proposed adjustments that include penalties, such as in a revenue agent's report.

In our teleconference on June 25, 2019, respondent's counsel confirmed that the report that Mr. Dickerson sent to petitioners and their representatives on May 8, 2015, (which is not currently in the record) did advise them of the proposed penalties. Therefore, our recent opinion in Clay & Osceola raises the question of whether Mr. Maclennan's approval of those penalties on May 19, 2015, was too late.

It is therefore,

ORDERED that the record in the present cases shall be reopened to allow the parties to submit by stipulation the report that Mr. Dickerson sent to petitioners and their representatives on May 8, 2015. It is further

ORDERED that the parties shall, by July 28, 2019, submit supplemental briefs addressing the question of the timeliness of the supervisory approval required by section 6751(b)(1) of the determination of the penalties at issue in these cases.

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

Dated: Washington, D.C.
June 28, 2019