

**UNITED STATES TAX COURT**  
**WASHINGTON, DC 20217**

LAWRENCE G. GRAEV & LORNA GRAEV,	)	
	)	
Petitioners,	)	
	)	
v.	)	Docket No. 30638-08.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

**ORDER**

On April 14, 2014, petitioners filed a motion for partial summary judgment regarding the section 6662(a) accuracy-related penalties at issue for tax years 2004 and 2005. Petitioners assert that respondent failed to comply with the requirement of section 6751(b)(1) that “the initial determination of such [penalty] assessment [must be] \* \* \* personally approved (in writing) by the immediate supervisor of the individual making such determination”. Respondent filed a response on May 30, 2014. Petitioners filed a reply on June 18, 2014, and their First Supplemental Reply to Response to the Motion for Partial Summary Judgment on June 24, 2014. Respondent then filed his First Supplemental Response to Petitioners’ Motion for Partial Summary Judgment on July 11, 2014. We will require respondent to file a response to this order, addressing an issue that we believe has not yet been discussed.

The statutory notice of deficiency (“SNOD”) that underlies this case was issued on September 22, 2008, and was signed by a “Territory Manager” in the IRS’s “Small Business and Self-Employed” (“SBSE”) division. In that SNOD respondent determined gross valuation misstatement penalties pursuant to section 6662(h) and asserted, in the alternative, that petitioners are liable for section 6662(a) accuracy-related penalties. It appears that respondent’s position is that, for purposes of section 6751(b)(1), “the individual” who made “the initial determination” of the alternative section 6662(a) accuracy-related penalties is attorney Gerard Mackey, of the Office of Chief Counsel--and not the Revenue

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Agent originally assigned to this case, Stephen Feld (or any another individual in Exam or the Technical Services Unit)--and that Mr. Mackey's immediate supervisor approved his determination in compliance with section 6751(b). We understand respondent's contention to be not that Mr. Mackey simply advised or recommended the penalty to IRS examination personnel who then made the determination (since advising and recommending are evidently not subject to section 6751(b)), but rather that Mr. Mackey was "the individual" who made "the initial determination". However, the document asserting that penalty determination is not a pleading filed in this suit by Chief Counsel (e.g., an answer or amended answer that newly pleads an alternative penalty), but is instead the original SNOD issued by SBSE.

The Secretary is authorized by statute to determine a deficiency in tax and penalty and to issue an SNOD. See secs. 6201(a), 6212, 6665(a). It appears that the authority to issue an SNOD is the subject of Delegation Order 4-8 (Internal Revenue Manual pt. 1.2.43.9 (Sept. 4, 2012), and that the delegated persons include Territory Managers in SBSE. However, that delegation does not seem to extend to the Office of Chief Counsel. If, in fact, it was Mr. Mackey who made "the initial determination of such [sec. 6662(a) penalty] assessment", then it would seem that there must be some delegation of authority to Chief Counsel to make such a determination. The undersigned judge is unaware of any other delegation to Chief Counsel of the authority to determine a penalty liability in an SNOD; and respondent has not yet identified a relevant delegation of authority that would enable a Chief Counsel attorney to be "the individual" who makes such a determination. Therefore, it is

ORDERED that, no later than August 4, 2014, respondent shall file a response to this order, identifying any relevant delegation of authority to Chief Counsel and commenting on or correcting the foregoing tentative discussion. It is further

ORDERED that, no later than August 18, 2014, petitioners shall file a reply to respondent's response to this order.

**(Signed) David Gustafson**  
**Judge**

Dated: Washington, D.C.  
July 16, 2014