

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

RODERICK M. CAMPBELL & C.	)	
SANDRA CAMPBELL,	)	
	)	
Petitioners,	)	
	)	
v.	)	Docket No. 30224-12.
	)	
COMMISSIONER OF INTERNAL	)	
REVENUE,	)	
	)	
Respondent.	)	

**ORDER**

On February 5, 2018, respondent filed an unopposed Motion to Reopen the Record. Respondent moves that the Court reopen the record to allow the admission of evidence necessary to establish that respondent met the requirements of I.R.C. section 6751(b) in asserting the I.R.C. section 6662 penalty against petitioners for the 2008 taxable year. That evidence--showing supervisory written approval of the initial penalty determination prior to the issuance of the notice of deficiency forming the basis of this case--is contained in a Joint Third Stipulation of Facts lodged by the parties also on February 5, 2018.

The evidentiary record in this case was closed on April 4, 2016, and post-trial briefing was completed by the parties on May 16, 2016. At the time the record was closed and briefing was completed, it was unclear when the Commissioner’s burden of production under I.R.C. section 6751(b) had to be established. Indeed, on November 30, 2016, the Court issued its opinion in Graev v. Commissioner, 147 T.C. No. 16 (November 30, 2016) (Graev II), squarely addressing the question when supervisory approval of a penalty determination is required. In Graev II, 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 on the other hand argued not only that 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, slip op. at 76. Then on March 20, 2017, came the Court of Appeals for the Second Circuit's opinion in Chai v. Commissioner, 851 F.3d 190 (2nd Cir. 2017), aff'g in part, rev'g in part, T.C. Memo. 2015-42. The Graev II dissent figured prominently in the Second Circuit's Chai opinion; 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. Thereafter, by Order dated March 30, 2017, we granted respondent's unopposed motion to vacate the decision in Graev to allow for supplemental briefing regarding section I.R.C. section 6751(b), and on December 20, 2017, we issued our opinion in Graev v. Commissioner, 149 T.C. No. 23 (December 20, 2017) (Graev III). Consistent with the Second Circuit, we held that the Commissioner's burden of production under I.R.C. section 7491(c) includes establishing compliance with the supervisory approval requirement of I.R.C. section 6751(b). See Graev III, slip op. at 14.

Premises considered and in the light of the fact that reopening the record for the submission of additional evidence lies within the discretion of the Court, see Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 331 (1971), it is hereby

ORDERED that respondent's Motion to Reopen the Record, filed February 5, 2018, is granted, and the Clerk of the Court shall file the Joint Third Stipulation of Facts as of the date of this Order. The Joint Third Stipulation of Facts (with Exhibit 94-R attached thereto) is received into evidence. It is further

ORDERED that the record in this case is closed.

**(Signed) Tamara W. Ashford  
Judge**

Dated: Washington, D.C.  
February 8, 2018