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IRS Insights
A closer look.
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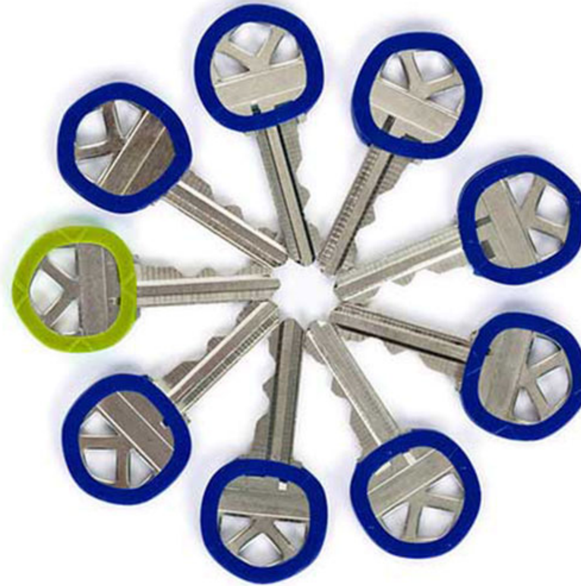

In this issue:

Tax Court Tentatively Disallows Conservation Easement Deduction Because the Taxpayer's Return Omitted Required Basis Information 1

Tax Court Holds that Supervisory Approval Must be Obtained Before the IRS Examination Function Formally Communicates Its Definite Decision to Impose Penalties 4

Tax Court Holds That IRS Has the Initial Burden of Production Under Section 6751(B)(1) But Does Not Have to Prove A Negative........ 6

Tax Court Holds that Supervisory Approval Must be Obtained Before the Issuance of a 30-Day Letter Proposing an Assessable Penalty 7

Tax Court Tentatively Disallows Conservation Easement Deduction Because the Taxpayer's Return Omitted Required Basis Information

In *Oakhill Woods, LLC v. Commissioner*,[1] the Tax Court tentatively disallowed a conservation easement charitable contribution deduction because the taxpayer's return omitted the "cost or adjusted basis" of the donated property from the appraisal summary (*i.e.*, Form 8283, *Noncash Charitable Contributions*) as required by the applicable regulations. The court rejected the taxpayer's argument that it strictly or substantially complied with the regulatory requirements and upheld the validity of the regulations. However, the court did not decide whether the taxpayer had reasonable cause for its failure to comply with the reporting requirements.

[1] T.C. Memo. 2020-24.

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Background

In 2007, a large paper-products company sold a tract consisting of 405 acres to real estate development company for $1,008,736, or $2,491 per acre.[2] On December 1, 2009, the real estate development company contributed 388 acres from this tract to Oakhill Woods, LLC ("Oakhill").[3] On December 7, 2010, Oakhill executed a deed of conservation easement to a "qualified organization" for purposes of section 170(h)(3).[4] The easement covered 379 of the 388 acres Oakhill originally acquired.[5]

On its timely filed Form 1065, *US Return of Partnership Income*, Oakhill claimed a charitable contribution deduction of $7,949,000, or $20,975 per acre, for its donation of the easement. Oakhill attached a copy of an appraisal that supported this valuation to its 2010 return.[6] In addition, as required, Oakhill attached a Form 8283 to its 2010 return.[7] The Form 8283 was prepared by a consulting firm that specializes in structuring conservation easements.[8] The consulting firm, in turn, claimed to have received legal advice for the return positions that it recommended to Oakhill.[9] The consulting firm did not include, and Oakhill did not provide, Oakhill's "cost or adjusted basis" in the donated property on the Form 8283 as required by the regulations and the instructions to Form 8283.[10] Instead, Oakhill provided a statement that effectively said that it was not providing the cost basis of the property because the cost basis was not relevant for computing the deduction and the property qualifies as capital gain property.[11]

The IRS subsequently audited Oakhill's 2010 return. In December 2014, the IRS issued a summary report proposing to disallow Oakhill's claimed deduction because it had not included its "cost or adjusted basis."[12] Within 90 days of receiving the report, Oakhill provided the information that was originally required to be provided on the Form 8283.[13] In September 2017, the IRS issued a timely notice of final partnership administrative adjustments ("FPAA").[14] The FPAA entirely disallowed the charitable contribution deduction and determined a 40% gross valuation misstatement penalty and, alternatively, a 20% substantial valuation misstatement penalty.[15]

Oakhill timely petitioned the US Tax Court for a readjustment of the partnership items.[16] The IRS filed a motion for partial summary judgment, alleging that it properly denied the deduction because Oakhill failed to provide the "cost or adjusted basis" of the donated property on the Form 8283. Oakhill filed a cross-motion for partial summary judgement alleging that it strictly, or at least substantially, complied with its reporting requirements under section 170, that the regulation that required it to include the "cost or adjusted basis" of the donated property was invalid, and that it had reasonable cause for failing to provide the required information.

The Tax Court's Opinion

Strict compliance: The regulations require the donor claiming a charitable contribution deduction for property other than cash or marketable securities to attach a fully completed appraisal summary (on a Form 8283) to the donor's tax return for the first year in which the charitable contribution deduction is obtained.[17] If the donor has reasonable cause for failing to include the information related to the "cost or adjusted basis" of the donated property, the donor is

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[2] *See id.*, Slip Op. at 3 – 4.
[3] *See id.*, Slip Op. at 4.
[4] *See id.*
[5] *See id.*
[6] *See id.*, Slip Op. at 5.
[7] *See id.*, Slip Op. at 7.
[8] *See id.*
[9] *See id.*
[10] *See id.*
[11] *See id.*, Slip Op. at 8.
[12] *See id.*
[13] *See id.*
[14] *See id.*, Slip Op. at 9.
[15] *See id.*
[16] *See id.*
[17] *See* Treas. Reg. § 1.170A-13(c)(2)(i)(B).

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directed to attach an appropriate explanation to the Form 8283.[18] If the donor attaches an appropriate explanation to the Form 8283, then the deduction will not be disallowed solely for failing to provide the required information.[19]

The Tax Court concluded that Oakhill did not strictly comply with the regulatory requirements because it did not report the "cost or adjusted basis" of the donated property and did not provide a reason for failing to provide such information. As the court put it, "asserting that one may ignore a requirement does not constitute strict compliance with it."[20]

The regulations allow a taxpayer that fails to attach a Form 8283 to avoid disallowance of the charitable contribution deduction if the taxpayer submits the Form 8283 to the IRS within 90 days of the IRS asking for it from the taxpayer.[21] Oakhill argued that it cured the initial omission by supplying the cost basis information within 90 days of receiving the December 2014 summary report. The Tax Court rejected this argument because Oakhill did not fail to attach a Form 8283; it attached an incomplete Form 8283.[22] In addition, the IRS never requested that Oakhill provide the missing information. Indeed, Oakhill only supplied the missing information after receiving a summary report from the IRS that proposed to entirely disallow the deduction.[23]

Substantial compliance: Oakhill also argued that it substantially complied with the regulations. Previous Tax Court cases have held that a failure to strictly comply with Treas. Reg. § 1.170A-13 can be excused if the Taxpayer substantially complied.[24] Substantial compliance may be shown if the taxpayer provided most of the information provided or the omission was inadvertent but only if the taxpayer satisfied all of the requirements that relate to the "substance or essence" of the statute.[25] Thus, the court examined whether Oakhill provided sufficient information to the IRS for the IRS to evaluate the reported contributions. The court cited legislative history to show that Congress wanted to give the IRS tools that would enable it to identify inflated charitable contribution deductions.[26] In this case, although the cost basis of the property was disclosed in the appraisal that was attached to Oakhill's 2010 return, the court concluded that the omitted basis information was essential for quickly identifying which returns to select for additional scrutiny. Accordingly, the court held that Oakhill did not substantially comply with Treas. Reg. § 1.170A-13.[27]

Validity of the Treas. Reg. § 1.170A-13 regulations: Having concluded that Oakhill failed to establish compliance with the Treas. Reg. § 1.170A-13 regulations, the court addressed Oakhill's challenge to the validity of those regulations. Oakhill cited section 155(a)(1) of the Deficit Reduction Act of 1984[28] ("DEFRA") in which Oakhill contended Congress articulated that it wanted taxpayers to report cost basis "on such return," and not on the Form 8283.

The Tax Court rejected this argument for three reasons. First, a taxpayer's return includes all IRS forms and schedules required to be attached to such return.[29] The Form 8283 is such a form.[30] Second, even if Form 8283 were not part of the taxpayer's return, nothing in section 155(a)(1) of DEFRA precludes the IRS from also requiring the inclusion of such information on the Form 8283.[31] Third, section 155(a)(3) of DEFRA provides that the "appraisal summary" (*i.e.*, the Form 8283) must include such information as required by regulations.[32] Thus, Congress expressly authorized the IRS to require that the "cost or adjusted basis" information be reported on the Form 8283.

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[18] *See* Treas. Reg. § 1.170A-13(c)(2)(iv)(C)(1).
[19] *See id.*
[20] *Oakhill*, T.C. Memo. 2020-24, Slip Op. at 13.
[21] *See* Treas. Reg. § 1.170A-13(c)(4)(iv)(H).
[22] *See Oakhill*, T.C. Memo. 2020-24, Slip Op. at 13 – 14.
[23] *See id.*, Slip Op. at 14 – 15.
[24] *See id.*, Slip Op. at 15 (citing *Bond v. Comm'r*, 100 T.C. 32, 41 (1993)).
[25] *See id.*, Slip Op. at 16 (quoting *Bond*, 100 T.C. at 41)).
[26] *See id.*, Slip Op. at 17 – 18.
[27] *See id.*, Slip Op. at 19 – 22.
[28] Pub. L. No. 98-369.
[29] *See* Treas. Reg. § 1.6011-1.
[30] *See Oakhill*, T.C. Memo. 2020-24, Slip Op. at 24 – 25.
[31] *See id.*, Slip Op. at 25.
[32] *See id.*, Slip Op. at 25 – 26.

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Reasonable cause defense: Section 170(f)(11)(A)(ii)(II) provides a statutory reasonable cause defense for failing to comply with the regulatory reporting requirements. This reasonable cause defense applies if "it is shown that the failure to meet such requirements is due to reasonable cause and not willful neglect."[33] The court noted that the statutory reasonable cause defense is similar to the reasonable cause defense that applies to various penalties and additions to tax under the Code.[34] The case law defines reasonable cause for such purposes as exercising ordinary business care and prudence.[35] The regulations further provide that "[t]he determination of whether a taxpayer acted with reasonable cause and good faith is made on a case-by-case basis, taking into account all pertinent facts and circumstances."[36]

Oakhill argued that it had reasonable cause for omitting the cost or adjusted basis of the donated property because it relied on advice from the consulting firm, which allegedly relied on advice from an outside law firm, and its CPA.[37] In this case, the court concluded that, because the resolution of this issue would require the court to address several questions that are currently disputed by the parties, summary judgment for either party could not be granted. The court noted, that to answer these questions, it would have to determine whether the consulting firm was a "competent and independent advisor unburdened with a conflict of interest,"[38] whether Oakhill can rely on legal advice it received indirectly, whether Oakhill's CPA was a competent tax professional, and whether Oakhill actually relied in good faith on the advice it received.

Tax Court Holds that Supervisory Approval Must be Obtained Before the IRS Examination Function Formally Communicates Its Definite Decision to Impose Penalties

In *Belair Woods, LLC v. Commissioner*,[39] a divided Tax Court held that supervisory approval of a penalty under section 6751(b)(1) must be obtained before the issuance of a formal communication to the taxpayer of the definite decision of the IRS Examination Function to impose the penalty. A communication that fails to meet this standard does not trigger the supervisory approval requirement.

Background

Belair Woods, LLC claimed a conservation easement charitable contribution deduction on its 2009 return. In December 2012, the IRS sent a Letter 1807 to the tax matters partner of Belair Woods. The Letter 1807 invited the tax matters partner to a closing conference to discuss proposed adjustments. An attachment to the Letter 1807 listed various proposed adjustments, including penalties under sections 6662(c) (negligence), 6662(d) (substantial understatement), and 6662(h) (gross valuation misstatement).

In September 2014, the revenue agent's manager signed a civil penalty approval form that listed penalties under sections 6662(c), (d), and (h). In March 2015, the IRS issued a 60-Day Letter to the tax matters partner. And in June 2017, an Appeals officer issued a notice of final partnership administrative adjustment ("FPAA") disallowing the charitable contribution deduction and imposing penalties under sections 6662(c), 6662(d), 6662(e) (substantial valuation misstatement), and 6662(h). The IRS did not obtain additional supervisory approval before issuing the FPAA.

Issue

Section 6751(b)(1) provides that, subject to certain exceptions, the IRS cannot assess a penalty under the Code "unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of

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[33] IRC § 170(f)(11)(A)(ii)(II).
[34] *See Oakhill*, T.C. Memo. 2020-24, Slip Op. at 28 (citing IRC §§ 6039G(c), 6652(f) – (j), 6704(c)(1), 6709(c)).
[35] *See id.*, Slip Op. at 29.
[36] Treas. Reg. § 1.6664-4(b)(1).
[37] *See Oakhill*, T.C. Memo. 2020-24, Slip Op. at 30.
[38] *See id.* (quoting *Mortensen v. Comm'r*, 440 F.3d 375, 387 (6th Cir. 2006)).
[39] 154 T.C. No. 1 (Jan. 6, 2020).

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the individual making such determination." The issue in this case is whether the Letter 1807 was an "initial determination" under section 6751(b)(1). If it was, then supervisory approval for all of the penalties was not timely. If it was not, then supervisory approval for all of the penalties, with the exception of the section 6662(e) penalty, was timely.

Majority Opinion

The majority opinion relied heavily on 2 recent Tax Court opinions: *Kestin v. Commissioner* and *Clay v. Commissioner*.[40] [41] In *Kestin* the court held that the issuance of a Letter 3176C – which advised the taxpayer that his submission was frivolous and will be subject to penalty under section 6702 if not withdrawn – did not constitute an "initial determination" under section 6751(b)(1) because it did not purport to determine that the penalty applied.[42] In *Clay*, the court held that the issuance of a 30-Day Letter was an "initial determination" because the 30-Day Letter formally communicated to the taxpayers the Examination Function's definite decision to assert penalties.[43]

The majority reasoned, that like the Letter 3176C in *Kestin*, the Letter 1807 was not an initial determination requiring prior supervisory approval because the Letter 1807 contained proposed adjustments and invited the taxpayer to provide additional information at a closing conference.[44] By contrast, like the 30-Day Letter in *Clay*, the 60-Day Letter here was an "initial determination" because the 60-Day Letter formally communicated to Belair Woods, LLC the Examination Function's definite decision to assert penalties.[45] Because supervisory approval was obtained before the issuance of the 60-Day Letter with respect to the penalties under sections 6662(c), (d), and (h), the court held that the supervisory approval was timely for those three penalties.[46]

To support its conclusion that the term "initial determination" requires a definite decision to assert penalties that is formally communicated to the taxpayer, the majority opinion looked at other provisions in the Code that use the term "determination." For example, with respect to collection due process and TEFRA determinations, the Tax Court has held that an IRS determination occurs when the notice embodying such determination is issued to the taxpayer.[47] In addition, citing *United States v. Boyle*,[48] the majority opinion stressed the importance of having a bright line rule that would be easy for the IRS and the courts to apply.[49]

Dissenting Opinion 1

The first dissent criticized the majority opinion on two accounts: First, as the Second Circuit in *Chai v. Commissioner*[50] explained, the legislative history of section 6751(b)(1) makes clear that the purpose of that section is to prevent unapproved penalty proposals from being used as a bargaining chip.[51] The majority opinion undermines the legislative purpose for imposing the section 6751(b)(1) requirement in the first instance if the Letter 1807 can raise unapproved penalties.

Second, all communications from the IRS proposing a deficiency and a related penalty – including a 30-Day Letter or a 60-Day Letter – are proposed adjustments. A determination is only final when the IRS issues a notice of deficiency or an FPAA to the taxpayer. Thus, the distinction that the majority opinion made between the 60-Day Letter and the Letter 1807 failed to convince the first dissenting opinion.[52]

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[40] 152 T.C. 223 (2019).
[41] 153 T.C. No. 2 (Aug. 29, 2019).
[42] *See Belair Woods*, 154 T.C. No. 1, Slip Op. at 16 – 18.
[43] *See id.*, Slip Op. at 12 – 13.
[44] *See id.*, Slip Op. at 16 – 18.
[45] *See id.*, Slip Op. at 13.
[46] *See id.*, Slip Op. at 23 – 24.
[47] *See id.*, Slip Op. at 21.
[48] *United States v. Boyle*, 469 US 241 (1985).
[49] *Belair Woods*, 154 T.C. No. 1, Slip Op. at 25.
[50] 851 F.3d 190 (2d Cir. 2017).
[51] *Belair Woods*, 154 T.C. No. 1, Slip Op. at 32 (Marvel, J., dissenting).
[52] *See id.*, Slip Op. at 33.

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Dissenting Opinion 2

The second dissent also criticized the majority opinion on two accounts: First, the text of section 6751(b)(1) requires supervisory approval before an "initial determination," not "the determination."[53]

Second, section 6751(b)(1) refers to an initial determination of an "individual" to impose penalties. However, the majority opinion requires a definite determination by the Examination Function – *i.e.*, a formal decision of the IRS and not a determination made by the IRS employee proposing the penalty.[54]

Tax Court Holds That IRS Has the Initial Burden of Production Under Section 6751(B)(1) But Does Not Have to Prove A Negative

In *Frost v. Commissioner*, [55] the Tax Court addressed the burden of production with respect to compliance with the requirements of Section 7651(b)(1). The Tax Court held that, after the IRS met its initial burden of production by introducing evidence demonstrating compliance with the requirements of Section 6751(b)(1), the burden shifted to the taxpayer to rebut the evidence. The Taxpayer failed to counter the IRS's evidence; therefore, the Tax Court sustained the penalty.

Background

Frost involved a self-employed taxpayer (the "Taxpayer") who traveled between several states, including Oregon and Texas, to serve his clients. Taxpayer owned an 80% interest in an LLC that was treated as a partnership for US tax purposes. For 2010, 2011, and 2012, the Taxpayer claimed deductions for travel and other business expenditures on his Form 1040, *Individual Income Tax Return*, and on Schedule C, *Profit or Loss From Business*. In addition, in 2011, Taxpayer claimed his purported distributive share of losses sustained by the LLC on his Schedule E, *Supplemental Income and Loss*. Many of the expenses on Taxpayer's Schedule C matched those listed in the attachment to the LLC's Form 1065.

The IRS reduced Taxpayer's deductions by $39,709, $34,678, and $13,204 for 2010, 2011, and 2012, respectively, and disallowed all of Taxpayer's Schedule E deduction relating to his distributive share of the LLC's loss for 2011. The IRS issued notices of deficiency for underpayments of tax for each year and determined underpayment penalties under Sections 6662(a), 6662(b)(1), and 6662(b)(2). The IRS introduced into evidence an electronically signed Civil Penalty Approval Form approving the substantial understatement penalty for 2012. For 2010 and 2011, however, the IRS had no record of any penalty approval.

Tax Court Proceedings

The Tax Court found that Taxpayer failed to provide adequate records to support his deductions. A taxpayer must prove his entitlement to any deductions and credits claimed.[56] In addition, there are strict substantiation requirements for travel, meals, and entertainment that require taxpayers maintain records to show: 1) amount of the expense, 2) the time and place of the travel or use, and 3) the business purpose.[57] Taxpayer produced no evidence substantiating the deductions; therefore, the court sustained the IRS adjustments. Taxpayer was also unable to demonstrate that he had sufficient adjusted basis in his partnership interest in the LLC to claim his distributive share of the LLC's losses.[58] Therefore, the court sustained the IRS's disallowance.

The Tax Court then turned its focus to the penalties. Sections 6662(a), 6662(b)(1), and 6662(b)(2) impose accuracy-related penalties equal to 20% of the portion of the underpayment of tax that are attributable to negligence or

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[53] *See id.*, Slip Op. at 35 – 37 (Gustafson, J., dissenting).
[54] *See id.*
[55] *Frost v. Comm'r*, 154 T.C. No. 2 (Jan. 7, 2020).
[56] *INDOPCO, Inc. v. Comm'r*, 503 US 79, 84 (1992).
[57] *See* Treas. Reg. § 1.274-5T(b)(2).
[58] *See* IRC § 704(d).

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intentional disregard of rules or regulations.[59] The Tax Court had to determine how to assign the burden of production between the Taxpayer and the IRS. For penalties, additions to tax, and additional amounts, Section 7491(c) provides that the IRS has the burden to produce sufficient evidence to support the imposition of penalties or additions to tax.[60] In *Wheeler v Commissioner*,[61] the Tax Court held that, under Section 7491(c), the IRS had to meet its burden or production by introducing evidence showing that the taxpayer did not file or pay his return timely.

In this case, the Tax Court held that, under Section 7491(c), the IRS bore the burden of producing evidence that it complied with the requirements of Section 6751(b)(1). Section 6751(b)(1) requires that an initial determination of certain penalties be personally approved in writing by the immediate supervisor of the individual assessing the penalties.[62] This approval must precede the first formal communication to the taxpayer of the assertion by the IRS of the application of the penalty.[63]

The Tax Court further held that after the IRS satisfies its initial burden of showing that it complied with the requirements of Section 6751(b)(1), the Taxpayer has the burden come forward with evidence to rebut this showing. If the IRS meets this burden and the Taxpayer offered no evidence to rebut the imposition of penalties, the penalties would be upheld.

In this case, the IRS did not have any evidence that it obtained written supervisory approvals before the initial determination of the penalties for 2010 and 2011. For 2012, however, the IRS produced an electronically signed Civil Penalty Approval Form. The question before the Tax Court was whether this showing was sufficient to satisfy the initial burden of production or whether the IRS must demonstrate that there were no formal communications to the Taxpayer of the penalty determination precedent to the signing of the Civil Penalty Approval Form. The Tax Court held that the evidence introduced was sufficient and the IRS did not have to prove a negative by showing that there were no prior formal communications.[64] Because the Taxpayer did not have any contrary evidence, the Tax Court sustained the penalties for 2012.

Tax Court Holds that Supervisory Approval Must be Obtained Before the Issuance of a 30-Day Letter Proposing an Assessable Penalty

In *Laidlaw's Harley Davidson Sales, Inc. v. Commissioner*,[65] the Tax Court case held that the IRS may not assess an assessable penalty under section 6707A unless it obtains supervisory approval before issuing a 30-Day Letter to the taxpayer that proposes to assess the penalty.

Background

The IRS determined that Laidlaw's Harley Davidson Sales, Inc. ("Laidlaw's") failed to timely disclose its participation in a listed transaction when it filed a Form 1120, *US Corporation Income Tax Return*, for the tax year ending May 31, 2008.[66] The revenue agent issued a 30-Day Letter that proposed to assess a section 6707A assessable penalty for failing to disclose the reportable transaction information to Laidlaw's.[67] Approximately three months later, the agent's immediate supervisor approved the penalty assertion and signed a Civil Penalty Approval Form.[68]

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[59] *See* IRC § 6662.
[60] *See* IRC § 7491(c).
[61] *See Wheeler v. Comm'r*, 127 T.C. 200 (2006).
[62] *See* IRC § 6751(b)(1).
[63] *See Clay v. Comm'r*, 152 T.C. at 249.
[64] *Frost v. Comm'r*, 154 T.C. at 23 (Jan. 7, 2020).
[65] 154 T.C. No. 4 (Jan. 16, 2020).
[66] *See id.*, Slip Op. at 4 – 5.
[67] *See id.*, Slip Op. at 6 – 8.
[68] *See id.*, Slip Op. at 8 – 9.

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Laidlaw's unsuccessfully contested the penalty in Appeals, and the IRS assessed the penalty.[69] After Laidlaw's received a levy notice, it requested a collection due process hearing. In the collection due process hearing, Appeals sustained the levy action.[70] Laidlaw's subsequently petitioned the Tax Court to review the Appeals levy determination.

Issues

Section 6751(b)(1) provides that, subject to certain exceptions, the IRS cannot assess a penalty under the Code "unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination." This case presents two issues regarding the application of the supervisory approval requirement under section 6751(b)(1) to the section 6707A assessable penalty: First, whether the requirement applies to that penalty. Second, whether supervisory approval must be obtained before the IRS issues a 30-Day Letter to the taxpayer that proposes to assess such penalty.

Court's Opinion

Before addressing the applicability of the section 6751(b) supervisory approval requirement to the assessable penalty under section 6707A, the Tax Court observed that an Appeals officer must obtain verification that the requirements of "any applicable law and administrative procedure" were met in a collection due process hearing under section 6330.[71] Thus, in *ATL & Sons Holdings, Inc. v. Commissioner*,[72] the court held that the Appeals officer must verify that written supervisory approval of a penalty was timely obtained in a collection due process hearing.[73]

The court then addressed whether the section 6751(b)(1) supervisory approval requirement applies to the assessable penalty under section 6707A. The court observed that, by its terms, section 6751(b)(1) applies to all penalties under the Code unless specifically excepted.[74] The "reportable transaction" penalty is repeatedly identified as a "penalty" in the title and text of section 6707A.[75] Thus, the court concluded, that section 6751(b)(1) applies to the section 6707A assessable penalty.

Finally, the court addressed whether the IRS is required to obtain supervisory approval before the issuance of a 30-Day Letter to the taxpayer that proposes to assess a section 6707A penalty. With respect to penalties that are subject to deficiency procedures, the Tax Court previously held that supervisory approval is required before the issuance of a 30-Day Letter to the taxpayer because the issuance of the 30-Day Letter is considered an "initial determination" of the penalty.[76] However, the Tax Court had not previously decided whether the issuance of a 30-Day Letter that proposes an assessable penalty is an "initial determination."

Relying on *Chai v. Commissioner*,[77] the IRS argued that the supervisory approval here was timely because it occurred before the IRS assessed the penalty and no notice of deficiency was issued. In particular, the IRS argued that, under *Chai*, supervisory approval is timely if the approval is obtained while the IRS retains jurisdiction over the penalty.[78] The court rejected this argument because *Chai* never said that supervisory approval before assessment is sufficient if no notice of deficiency is issued.[79] Rather, *Chai* indicated that the requirement would make little sense if approval before a "final determination" sufficed.[80] In addition, the court observed that *Chai* held that "supervisory approval of a penalty in a deficiency case must be obtained 'no later than' when the notice of deficiency is issued," implying that supervisory approval of a penalty may sometimes be required before then.[81]

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[69] *See id.*, Slip Op. at 9.
[70] *See id.*, Slip Op. at 9 – 11.
[71] IRC § 6330(c)(1).
[72] 152 T.C. 138, 144 (2019).
[73] *Laidlaw's*, Slip Op., at 15.
[74] *See* IRC § 6751(b)(2).
[75] *See Laidlaw's*, Slip Op., at 19 – 20.
[76] *See id.*, Slip Op. at 21 (citing *Clay v. Comm'r* 152 T.C. 223 (2019)).
[77] 851 F.3d 190 (2d Cir. 2017).
[78] *See Laidlaw's*, Slip Op., at 23.
[79] *See id.*, Slip Op. at 23 – 24.
[80] *See id.*
[81] *See id.*, Slip Op. at 24 – 26.

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Thus, the court held that, like a 30-Day Letter that proposes a penalty subject to deficiency procedures, a 30-Day Letter that proposes to assess an assessable penalty is an "initial determination" under section 6751(b)(1).[82] Here, because supervisory approval was not obtained before the IRS sent the 30-Day Letter to Laidlaw's, the court held that the IRS did not comply with the requirements of section 6751(b) and, therefore, Appeals abused its discretion by sustaining the levy.

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36 USC 220506

[82] *See id.*, Slip Op. at 27.

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