TAXES - The Tax Magazine (2006 to Present), THE KNIGHT WATCH—*Kroner's* Impact on the IRS' Penalty Approval Requirement Under Code Sec. 6751, (Jan. 3, 2023)

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In *Kroner v. Commissioner*, [1] the Eleventh Circuit jumped into the foray of recent cases as to when an immediate supervisor's written approval must be obtained for purposes of Code Sec. 6751(b)(1). [2] The Eleventh Circuit found the statute, in relevant part, to be unambiguous. Accordingly, the Court held that the initial communications between a taxpayer and an Internal Revenue Service ("IRS" or "Service") agent regarding the imposition of penalties are irrelevant and an immediate supervisor can provide written approval of penalties until such time the IRS issues a notice of deficiency. The opinion is at odds with a plethora of United States Tax Court ("USTC") cases, as well as other circuit decisions. [3]

Chai (Second Circuit)

Until *Chai v. Commissioner*, most tax practitioners had paid little heed to Code Sec. 6751(b)(1), which 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. [4]

In *Chai*, the Second Circuit, in the context of a deficiency proceeding review involving penalty determinations, attempted to answer a question that has confounded numerous courts—what is an "initial determination" of a penalty? The phrase "initial determination" is only found in Code Sec. 6751(b)(1) and has not been defined by Congress or by regulations. Therefore, the Second Circuit resorted to the canons of statutory construction.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." [5] Where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" [6] However, if a statute is silent or ambiguous, a court may look to the statute's legislative history in an attempt to determine congressional intent. [7]

Focusing on the term "assessment," [8] the Second Circuit in *Chai* found that, in the context of a deficiency proceeding, a deficiency can be determined but an assessment cannot. Accordingly, the court held that the language of Code Sec. 6751(b) was ambiguous and considered the legislative history to understand the terms of the statute.

The court focused on the following legislative history: "[t]he Committee believes that penalties should only be imposed where appropriate and not as a bargaining chip." [9] The court found that "[t]he statute was meant to prevent IRS agents from threatening unjustified penalties to encourage taxpayers to settle." [10] Accordingly, supervisory approval had to be obtained prior to the issuance of the notice of deficiency. *In dicta*, the court in *Chai* resorted to the dictionary meaning of "initial". [11] "'[I]nitial' is defined as 'having to do with, indicating, or *occurring at the beginning*.'" [12] The court then held that the latest *initial* penalty determination can occur if "no later than the date the IRS issues the notice of deficiency (or files an answer or amended answer) asserting such penalty." [13] Thus, the Second Circuit's holding in *Chai* left unanswered an important question: when is the earliest that an "initial determination" can be made?

USTC post- *Chai*

Following *Chai*, the litigation floodgates opened in the USTC as to Code Sec. 6751(b). [14] Under Code Sec. 7491(c), the IRS bears the burden of production in any court proceeding with respect to any individual's liability for penalties. [15] In December 2017, the USTC held that compliance with Code Sec. 6751(b) is properly at issue in a deficiency case and a part of the IRS' burden of production under Code Sec. 7491(c). [16]

Similar to the Second Circuit, the USTC has looked to the dictionary defining the word "initial" as "having to do with, indicating, or occurring at the beginning." [17] The court has further held that a "determination" carries "a sense of definiteness and formality" [18] and "not a synonym for a mere suggestion, proposal, or initial informal mention of the possibility of the assertion of a penalty." [19] In this regard, "a 'determination' denotes a 'consequential moment' of IRS action," [20] which can be communicated to a taxpayer in a revenue agent report ("RAR"), 30-day letter, 60-day letter, notice of deficiency, or answer (or amended answer). Accordingly, an "initial determination" of a penalty subject to USTC review generally does not require supervisory approval to be made on a particular form but it does require a level of formality and finality.

The USTC has further held that, outside a judicial proceeding and in a deficiency context, "the 'initial determination' of a penalty assessment—the 'consequential moment' of IRS action, … is embodied in the document by which the Examination Division formally notifies the taxpayer, in writing, that it has completed its work and made an unequivocal decision to assert penalties." [21] In a judicial proceeding and in a deficiency context, the IRS may assert the initial determination of a penalty in an answer (or amended answer). [22] Regardless of whether the initial determination of penalties is made during or outside of a judicial proceeding, such initial determination subject to USTC review must generally be supervisor approved (in writing) prior to being formally communicated to the taxpayer.

Thus, the IRS bears the burden of production with respect to an individual's liability for penalties in any court proceeding. To satisfy this burden in the USTC, [23] the IRS must generally produce the following written evidence to demonstrate that certain penalties are appropriate in the absence of available defenses:

a. the identity of the individual who made the "initial determination,"
b. an approval, "in writing," of the specific penalty,
c. the identity of the person giving approval and his or her status as the "immediate supervisor," and
d. evidence that the supervisory approval was obtained no later than the date the taxpayer was issued written formal communication that the IRS has completed its work and made an unequivocal decision to assert penalties. [24]

Accordingly, if the Service fails to comply with this written approval requirement, a penalty subject to Code Sec. 6751(b)(1) generally cannot be sustained against the taxpayer in USTC. [25]

As the USTC was issuing numerous decisions as to Code Sec. 6751(b), the cases were being heard by the appellate courts.

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Roth (Tenth Circuit)

In *Roth*, another deficiency proceeding review involving penalty determinations, the Tenth Circuit affirmed the USTC decision. Focusing on the term "assessment," the Tenth Circuit found that the statute was ambiguous and presented "an obstacle to plain-language interpretation." [26] *Roth* then focused on the word "determination" as used in Code Sec. 6201(a) Assessment Authority, which provides, in part, that the IRS "is authorized and required to make the inquiries, *determinations*, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) …." [27] The court concluded: " [Code Sec.] 6751(b)'s plain language leaves open to debate when an initial determination takes place and whether that determination pertains to the IRS' early decision to seek a penalty or the later affirmance of that penalty and its resulting assessment." [28]

Laidlaw's (Ninth Circuit)

Unlike the penalties in *Chai* and *Roth*, which were subject to a deficiency dispute, the penalties at issue in *Laidlaw's* were immediately assessable. [29] In *Laidlaw's*, the revenue agent made an initial determination to impose penalties under Code Sec. 6707A against the taxpayer and issued a 30-day letter to the taxpayer prior to supervisory approval. After the taxpayer submitted a protest, the revenue agent's supervisor approved the penalty. The ensuing administrative appeal was unsuccessful. The IRS issued a notice of intent to levy, resulting in a collection due process hearing. The USTC agreed that the IRS had failed to comply with Code Sec. 6751(b).

On appeal, the Ninth Circuit reversed. The Ninth Circuit held that, unlike penalties under deficiency proceeding review, the supervisor had discretion in assessable penalties to approve or reject the revenue agent's initial determination until assessment. Therefore, as to assessable penalties there was "no basis in the text of the statute … that the written approval be obtained at any particular time prior to assessment." [30] Absent any ambiguity, there was no reason to resort to legislative history to interpret the rule. As the court stated: "But a determination that a penalty should be assessed and a communication to a taxpayer threatening the automatic assessment of a penalty are two different things, and the statute addresses only the former." [31]

Kroner (Eleventh Circuit)

Following the Ninth Circuit's opinion in *Laidlaw's*, the Eleventh Circuit issued its opinion in *Kroner* relating to penalties subject to a deficiency dispute. In *Kroner*, the taxpayer received $24.8 million of cash transfers from a business associate between 2005 and 2007. The taxpayer claimed the transfers were gifts. The IRS imposed $1.8 million in accuracy-related penalties. The taxpayer argued that the IRS had failed to timely obtain supervisory approval because the initial examination report had raised the accuracy-related penalties without the agent's supervisor's approval. Negotiations continued until the IRS issued a 30-day letter to the taxpayer with an updated examination report, which included the same accuracy-related penalties. The supervisor approved the penalties in the updated examination report. The USTC upheld the deficiency but struck down the penalties as a result of the IRS failing to comply with Code Sec. 6751(b). The IRS appealed the USTC's ruling to the Eleventh Circuit.

In its opening Appellant brief, [32] the Service quoted *Chai* for support of its argument that: " Code Sec. 6751(b)(1) requires written approval of the initial penalty determination no later than the date IRS issues the notice of deficiency (or files an answer or amended answer asserting such penalty)." [33], [34] Accordingly even if the statute was ambiguous, the Appellant viewed Chai as establishing a deadline—penalty determination must be approved in writing by the issuance of the notice of deficiency. Appellant's view ignored the phrase "no later than". In its Reply Brief, [35] the Service primarily relied for a plain reading of the statute [36] to read as follows: "the timeliness requirements of [Code Sec.] 6751(b)(1) are satisfied so long as supervisory approval is obtained before the penalty is 'assessed' and while the supervisor still has the discretion to approve or disapprove the

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initial penalty determination." [37] The Eleventh Circuit agreed with the Service's Reply Brief position [38] and found the statute to be unambiguous and therefore there was no need to review the legislative history. The Court analyzed the statute as follows:

> The statute provides that "[n]o penalty … shall be assessed unless the initial determination of such assessment is personally approved." Stripped to bare bones, the statute directs that the IRS shall not take action X "unless" condition Y is met. X is the assessment of a covered penalty, and Y is the act of obtaining supervisory approval of the initial determination of assessment. The word "initial" modifies the phrase "determination of such assessment," all on the right side of the "unless" and all concerned with *what* must be approved to satisfy the statute's condition. "Initial" does not modify the phrase "no penalty under this title shall be assessed" on the opposite side of the "unless," which is the clause concerned with *when* in the process of a tax investigation the statute restricts the IRS's actions. In other words, "initial" describes *what* must be approved, not *when*. [39]

Thus, the court stated "[i]n other words, 'initial' describes *what* must be approved, not *when*." [40] Accordingly, the court held the statutory language is clear in requiring only that approval of the initial determination be obtained before the penalties are "assessed." [41]

More Jurisdictions, More Problems

Given the above, it is apparent we have a split between several U.S. Circuit Courts of Appeals, while the USTC has employed its own standard for cases not appealable to those circuit courts that have addressed the issue, which means everyone is dealing with a mess.

- In deficiency cases, the Second Circuit, Tenth Circuit, and USTC found Code Sec. 6751(b)(1) to be ambiguous, whereas the Eleventh Circuit found the statute to be unambiguous. The Ninth Circuit, which dealt with an assessable penalty, did not opine on the statute's ambiguity in deficiency cases.
- The USTC, Second Circuit, and Tenth Circuit emphasized for purposes of timing the following terms in the statute: 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. By focusing on the term "initial," an element of timing is interjected. Applying statutory construction rules led certain courts to revisit the legislative history of the statute.
- A review of the legislative history found that the statutory language was for the benefit of taxpayers. Accordingly, the legislative history led some courts, notably the USTC, to a finding that timing is a key component of the statute: Supervisory approval must generally be obtained no later than the date the taxpayer was issued written formal communication that the IRS has completed its work and made an unequivocal decision to assert penalties. [42]
- The Ninth Circuit (but only as to assessable penalties) and the Eleventh Circuit found Code Sec. 6751(b) to be unambiguous as to what the supervisor had to approve.
- The Ninth and Eleventh Circuits emphasized for purposes of the item to be reviewed the following terms: 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.
- The Ninth and Eleventh Circuits view the term determination as not one of timing, but *what* must be reviewed and ultimately approved by the supervisor prior to assessment: the subordinate's determination to impose penalties.
- The Ninth Circuit's opinion in *Laidlaw's* exposed an inherent flaw in Code Sec. 6751(b). The Ninth Circuit is correct that, strictly speaking, Code Sec. 6751(b)(1) can only strictly apply to assessable penalties.

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> Thus, the flaw in the Ninth Circuit's analysis is that, as the statute applies to all penalties subject the provision, the statute cannot just be clear on its face as to assessable penalties but ambiguous as to penalties subject to deficiency dispute. That is, the same approval process should apply occur as to the penalties, whether assessable or not.

There are three potential resolutions—the Supreme Court, Congress, or regulations. As to the three outcomes, issuing regulations may be the best course of action. The Service is correct that penalties are a means to deter bad actions or bad actors. A tax system based on a get-out-of-jail-free card is not a system that treats taxpayers on a consistent basis, *i.e.*, those that conduct the same action/transaction should end up with the same treatment. [43] At the same time, transparency ensures a fair and equitable tax system. The legislative history, which was meant to prevent the actions of rogue agents from impugning the reputation of the Service, should be heeded. Code Sec. 6751(b) was enacted in 1998 and, over 20 years later, the Service has not promulgated regulations regarding the statute.

Accordingly, regulations should be issued. For the regulations to be meaningful, the IRS will have to recognize that the Code Sec. 6751(b) is ambiguous. The notice and comment procedures of the Administrative Procedure Act will allow for taxpayers' and the Service's respective positions to be vetted.

Conclusion

Courts continue to clarify and define the contours of Code Sec. 6751(b). These decisions have resulted in a split among the circuits. Rather than leaving for the courts to discern statutory intent, the Service should issue regulations and resolve the ambiguities that permeate the statute.

Footnotes

1 CA-11, 2022-2 USTC ¶50,226, 48 F4th 1272 (2022).

2 Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended, and the Treasury Regulations.

3 *See J. Chai*, CA-2, 2017-1 USTC ¶50,180, 851 F3d 190 (2017), *aff'g in part, rev'g in part* 109 TCM 1206, Dec. 60,250(M), TC Memo. 2015-42; *Roth*, CA-10, 922 F3d 1126 (2019), and *Laidlaw's Harley Davidson Sales, Inc.*, CA-9, 2022-1 USTC ¶50,131, 29 F4th 1066 (2022).

4 Code Sec. 6751(b)(1) (emphasis added). Certain penalties, including failure to file, failure to pay, estimated income tax, and automatically calculated penalties, are excluded from the procedural requirements under Code Sec. 6751(b)(1). *See* Code Sec. 6751(b)(2). Accordingly, all penalties referenced in the context of Code Sec. 6751(b) are those penalties not excluded from the procedural requirements by Code Sec. 6751(b)(2).

5 *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 US 189, 105 SCt 658, 661 (1985).

6 *Ron Pair Enters., Inc.*, SCt, 89-1 USTC ¶9179, 489 US 235, 241, 109 SCt 1026 (1989) (quoting *Caminetti*, 242 US 470, 485, 37 SCt 192 (1917)); *see also Conn. Nat'l Bank v. Germain,* 503 US 249, 253–54, 112 SCt 1146 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Kozeny*, CA-2, 541 F3d 166, 170 (2008); *Coggin Automotive Corp.*, CA-11, 2002-1 USTC ¶50,448, 292 F3d 1326, 1332 (2002) (holding, in overruling a USTC decision based on legislative history, that if the statute's language was clear there was no need to go beyond the statute's plain language and into its legislative history to determine congressional purpose); *Morrison*, CA-4, 844 F2d 1057, 1064 (1988) ("[W]hen the terms of a statute are clear, its language is conclusive and courts are not free to replace that clear language with an unenacted legislative intent.").

7 *See Burlington N.R.R. v. Okla. Tax Comm'r*, 481 US 454, 461, 107 SCt 1855, (1987); *Harrell*, CA-9, 637 F3d 1008, 1012 (2011); *F. Bronstein*, 138 TC 382, 386, Dec. 59,060 (2012); *G.J. Pallottini*, 90 TC 498, 503, Dec. 44,671 (1988); *H.Y. Huntsberry*, 83 TC 742, 747-748, Dec. 41,632 (1984).

8 Assessment being defined as follows:

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> "Assessment" is the formal recording of a taxpayer's tax liability on the tax rolls. (Footnote Omitted) *See* I.R.C. § 6203 (stating that an assessment is "made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary"). It is "essentially a bookkeeping notation" of what the taxpayer is required to pay the Government. *Laing v. United States*, 423 U.S. 161, 170 n. 13 (1976); *see Hibbs v. Winn*, 542 U.S. 88, 115 (2004) (Kennedy, J., dissenting). In essence, it is the last of a number of steps required before the IRS can collect a "deficiency"-a tax liability greater than what the taxpayer reported on his return. Before it can "assess" a deficiency, the IRS must first determine a "deficiency" in a taxpayer's liability. *See* I.R.C. § 6201(a). The IRS then announces to the taxpayer in a notice of deficiency its intention to assess that deficiency. *See* I.R.C. § 6212(a). If the taxpayer does not file a Tax Court petition within 90 days, "the deficiency … shall be assessed." I.R.C. § 6213(c). If he does file a Tax Court petition for a "redetermination of the deficiency" within the 90-day period, however, the IRS is restricted from assessing the deficiency "until the decision of the Tax Court has become final." I.R.C. § 6213(a). It is then the Tax Court's job to determine whether a deficiency should be assessed and, if so, the amount thereof. *See* I.R.C. §§ 6214(a) ("[T]he Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency …."), 6215(a) ("[T]he entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed …."). *Id.* at 218.

9 *IRS Restructuring: Hearings on H.R. 2676 Before the S. Comm. on Finance*, 105th Cong. 92 (1998) (statement of Stefan F. Tucker, Chair-Elect, Section of Taxation, American Bar Association) "[T]he IRS will often say, if you don't settle, we are going to assert the penalties.")).

10 *Chai*, CA-2, 2017-1 USTC ¶50,180, 851 F3d at 219.

11 Courts have recognized, as a matter of statutory construction, the validity of using a dictionary to define the meaning of common words in a statute, unless the statute provides a specific definition. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 US 560, 132 SCt 1997, 2002-03 (2012).

12 *Chai*, CA-2, 2017-1 USTC ¶50,180, 851 F3d at 220 (emphasis added). The court also cited an example from Black's Law Dictionary of the term "initial determination" providing "the *first determination* made by the Social Security Administration of a person's eligibility for benefits"). *Id.* at 220–221 (emphasis added).

13 *Id*. at 221.

14 The USTC is a court of national jurisdiction with expertise in the area of Federal taxes. *Central Pa. Sav. Association*, 104 TC 384, 406, Dec. 50,559 (1995) (Halpern, J., dissenting). The USTC will follow its own precedent unless a contrary position is held by the circuit in which an appeal would be held. *J.E. Golsen*, 54 TC 742, Dec. 30,049 (1970), *aff'd on other grounds*, CA-10, 71-2 USTC ¶9497, 445 F2d 985 (1971).

15 Code Sec. 7491(c) applies only to the liability of an *individual* for penalties; thus, the IRS does not have the burden of production in a court proceeding with respect to the liability of an estate, corporation, or partnership for penalties. *See Estate of Jackson*, Dec. 61,858(M), TC Memo. 2021-48, at *248 (holding that Michael Jackson's estate, and not the IRS, bore the burden of production because an estate is not an individual); *NT, Inc.*, 126 TC 191, 195, Dec. 56,487 (2006) (holding that the IRS does not bear the burden of production regarding the liability of a corporation for penalties because Code Sec. 7491(c) applies only to an individual); *Dynamo Holdings Ltd. P'ship*, 150 TC 224, 236, 150 TC —, No. 10, Dec. 61,170 (2018) (holding that a TEFRA partnership, and not the IRS, bore the burden of production). Whether the rationale of *Dynamo Holdings* continues to apply in matters arising pursuant to partnership audit rules enacted by the Bipartisan Budget Act of 2015 has not been addressed by the U.S. Tax Court.

16 *L.G. Graev*, 149 TC 485, 493, 149 TC No. 23, Dec. 61,095 (2017).

17 *B.E. Legg*, 145 TC 344, 349, Dec. 60,464 (2015).

18 *Belair Woods, LLC*, 154 TC 1, 10, Dec. 61,601 (2020).

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19 *Tribune Media Co.*, 119 TCM 1006, Dec. 61,603(M), TC Memo. 2020-2, at *19.

20 *Belair Woods*, 154 TC at 11, Dec. 61,601 (citing *Chai*, CA-2, 2017-1 USTC ¶50,180, 851 F3d at 220-21).

21 *Belair Woods*, 154 TC at 15, Dec. 61,601 (indicating this interpretation would be as close to an objective, bright-line rule and "may help achieve that goal in a manner consistent with the statutory text.").

22 *See Chai*, CA-2, 2017-1 USTC ¶50,180, 851 F3d at 221 *; C.H. Koh*, 119 TCM 1529, Dec. 61,689(M), TC Memo. 2020-77, at *2.

23 *But see* n. 12 *supra*.

24 *See Belair Woods*, 154 TC at 15, Dec. 61,601; *Palmolive Bldg. Investors, LLC*, 152 TC 75, 87, Dec. 61,041 (2019). In this regard, the U.S. Tax Court focuses on the IRS communication to the taxpayer (*i.e.*, an objective test) and not the subjective intentions of IRS personnel regarding imposition of penalties. *See J.R. Oropeza*, 155 TC 132, 142, Dec. 61,763 (2020).

25 As is evident in this article, the case law in this area continues to develop and may depend on the circuit court to which an appeal would be held. Moreover, taxpayers involved in the same transaction may face different penalties as a result of the IRS compliance with Code Sec. 6751(b)(1). *See, e.g., K.A. Sells*, 121 TCM 1072, Dec. 61,815(M), TC Memo. 2021-12, at *34–35 (holding that the IRS met its requirement under Section 6751(b)(1) with respect to penalties asserted against some, but not all, taxpayers involved in the same conservation easement transaction).

26 922 F3d at 1132.

27 *See* 922 F3d at 1131 (emphasis added).

28 922 F3d at 1132.

29 The penalties at issue were under Code Sec. 6707A. Other immediately assessable penalties include, for example, foreign information return reporting penalties under Code Secs. 6038, 6038A, 6038B, 6038C, and 6038D.

30 *Laidlaw's*, 29 F4th at 1072.

31 *Id.* n. 6.

32 *Kroner*, Docket No. 20-13902, Brief For The Appellant (Jan. 11, 2021) (hereinafter referred to as "Appellant's Brief").

33 The brief stated at page 28:

> Under this interpretation, then, supervisory approval is timely so long as it is obtained no later than the date the IRS issues the notice of deficiency. This reading of the statute acknowledges the statute's explicit focus on *assessment* while also giving meaningful effect to statute's supervisory approval requirement. (Citation Omitted).

34 *Chai*, 851 F3d at 221; Appellant's Brief, at 20-21.

35 *Kroner*, Docket No. 20-13902, Reply Brief For The Commissioner (March 26, 2021) (hereinafter referred to as "Service's or Appellant's Reply Brief").

36 At pg. 6. The Service argued that ambiguity in the statute related only to what must be approved, not when the approval must occur. Therefore, legislative history would be appropriate to:

> … determine what constitutes an "initial determination of such assessment." But, as to the issue of *timeliness* of the supervisory approval itself, with which we are concerned here, the statutory language is clear in requiring only that approval of the initial determination be obtained before

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> the penalties are "assessed" and while the supervisor still has discretion to "approve[]" such determination. (Emphasis in Original).

37 *See* Service's Reply Brief at pg. 5. The Service's Reply Brief was filed after *Laidlaw's*. It is fair to assume that the Service's position was based on the *Laidlaw's*. The Service did not in the Reply Brief bring to the Court's attention the difference noted by the Ninth Circuit in *Laidlaw's* as to penalties that are assessable and those subject to statutory review.

38 The Service argued in its Reply Brief:

> The Tax Court's reliance on legislative history to establish an earlier deadline— *i.e.*, requiring supervisory approval before the "initial determination" to assess penalties is "communicated" to the taxpayer (Op. 28 -29)—was improper …. Hence, any ambiguity in the statute relates only to *what* must be approved, not *when* that approval must occur. Resort to the legislative history may therefore be appropriate to determine what it is, exactly, that must receive approval …." *See* Service's Reply Brief at pg. 6.

39 *Kroner*, 48 F4th at 1278 and 1279.

40 *Kroner*, 48 F4th at 1279.

41 *Id.*

42 *See Belair Woods, LLC*, 154 TC 1, 15, Dec. 61,601 (2020); *Palmolive Bldg. Investors, LLC*, 152 TC 75, 87, Dec. 61,041 (2019).

43 *IBM Corp.*, CtCls, 65-1 USTC ¶15,629, 170 CtCls 357, 343 F2d 914 (1965).

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