

No. 25-680

IN THE
Supreme Court of the United States

BERNARD T. SWIFT, JR., AND KATHY L. SWIFT,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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REPLY BRIEF FOR PETITIONERS

Section 6751(b)(1) sets a straightforward rule: before the IRS can assess a penalty, a supervisor must approve the “initial determination of such assessment”. Congress adopted that requirement to ensure penalties are only “imposed where appropriate and not as bargaining chips” by IRS auditors. S. Rep. No. 105-174, at 65 (1998).

The IRS does not dispute that approval is required or that timing matters. It argues instead that approval may come *after* the IRS has already made the determination, communicated it to the taxpayer, and used it to invite agreement. That position cannot be reconciled with the statute’s text, structure, or purpose.

The statute requires approval of the “initial” determination itself. Giving effect to that language, approval must occur before the determination is finalized and conveyed to the taxpayer. Otherwise, the word “initial” does no work at all.

The government’s theory (that approval is timely so long as it occurs while a supervisor retains “discretion”) confirms the point. Once the IRS communicates a penalty position to the taxpayer that they can accept or that otherwise become operative, the penalty determination has already taken effect. At that point, supervisory approval no longer constrains the decision; it merely ratifies it.

This case illustrates the problem. The IRS told the Swifts that it had “completed” its audit, asserted penalties, and offered to resolve the case on that basis

(which the Swifts could accept by signing a form)—while warning that greater penalties could follow. Pet. App. 114a–121a. Only afterward did a supervisor sign off. The IRS then followed through with its threat, issuing a notice of deficiency with higher penalties. That sequence is precisely what Congress sought to prevent: the use of unapproved penalties as bargaining leverage against citizens.

I. The circuit split is real and outcome-determinative.

The IRS does not meaningfully dispute that the courts of appeals are divided over section 6751(b). Instead, it attempts to sidestep the split by reframing the acknowledged conflict as a vehicle problem, arguing that the disagreement does not matter because the outcome would be the same for the Swifts under any interpretation of section 6751(b). Opp. 10. In doing so, the IRS effectively concedes the split while trying to minimize its significance. That effort fails because the division among the circuits is real and outcome-determinative in this case.

1. First, the IRS’s own construction of § 6751(b)—reflected in the Internal Revenue Manual and described by the IRS in its opposition brief as “[c]onsistent with the tax court’s decision in *Clay v. Commissioner*, 152 T.C. 223, 249 (2019)” (Opp. 9)—would resolve this case in the Swifts’ favor.

For years the Internal Revenue Manual instructed IRS agents to secure supervisory approval before issuing any written communication that offered taxpayers an opportunity to agree to penalties. *See* I.R.M. 20.1.5.18.4.1(4).

The December 31, 2015 letter did the exact opposite: it included a Form 870 allowing the Swifts to agree to the proposed 20% penalties. Pet. App. 21a. Yet no supervisory approval preceded that communication. *Id.* Under the IRS's own interpretation of the statute, the approval came too late, and the penalties cannot stand.

2. Second, the Swifts would prevail under the Tax Court's framework. The Fifth Circuit acknowledged that the Swifts presented "compelling reasons" why the December 31, 2015 letter constituted a formal communication triggering the approval requirement under Tax Court precedent. Pet. App. 22a. The court of appeals nonetheless affirmed on different grounds, adopting the Ninth Circuit's more lenient rule. If that rule were rejected, the same facts the Fifth Circuit found "compelling" would require reversal.

3. Third, the Swifts would prevail under the Second Circuit's framework. In *Chai*, the court explained that allowing "an unapproved initial determination of the penalty to proceed through administrative proceedings, settlement negotiations, and potential Tax Court proceedings, only to be approved sometime prior to assessment would do nothing to stem the abuses § 6751(b)(1) was meant to prevent." *Chai v. Commissioner*, 851 F.3d 190, 219 (2d Cir. 2017). The court therefore required approval no later than the notice of deficiency, while recognizing that approval may be required earlier depending on when the initial determination is made.

That distinction is dispositive. In *Chai*, the notice of deficiency was the first communication of the penalty and thus the first time the IRS presented its determination

to the taxpayer that he could accept. Here, by contrast, the IRS made and communicated its initial determination earlier, when it issued the December 31, 2015 letter offering immediate agreement to 20% penalties and threatening greater penalties if the determination was declined. The subsequent notice of deficiency, which included 40% penalties, reflected a different and final determination.

This case thus presents exactly what *Chai* forbids: the IRS put forward an unapproved penalty, using it as leverage. Had the Swifts agreed to accept the initial determination embodied in the December 31, 2015 letter by signing the included Form 870, no notice of deficiency would have ever been issued. Under *Chai*, that is precisely the sort of unapproved determination proceeding through “administrative proceedings” and “settlement negotiations” that the statute prohibits—and for that reason, the Swifts would prevail.

The government’s claim that the outcome would be the same under all approaches is therefore untenable. Under multiple governing frameworks, the Swifts would prevail on these undisputed facts.

II. The IRS’s interpretation of section 6751(b) is inconsistent with the statute’s text and purpose.

The IRS agrees that section 6751(b) requires timely supervisory approval of an “initial determination.” What it disputes is when that approval must occur. Aligning itself with several courts of appeals, the IRS endorses a rule in which approval can occur so late in the process that the statute’s core protection disappears.

1. Section 6751(b)(1) requires approval of the “initial determination of such assessment.” The IRS’s rule allows approval at any time before assessment, even after the IRS has already made and communicated that initial determination and given the taxpayer an opportunity to agree with it. That interpretation collapses “initial determination” into “assessment,” violating the settled rule that statutory terms must be given independent meaning.

If approval can come after the initial determination has already been made and deployed, then it is not approval of the “initial” determination at all.

2. The IRS instead focuses on “discretion”, using the term 17 times in its brief. But that term is found nowhere in the statute. Even more important is that the “discretionary” window established by several courts of appeals and the IRS is wrong. The IRS says that “the line that terminates the supervisor’s discretion is generally the issuance of the notice of deficiency.” Opp. 7. The IRS also says that the “supervisor undisputedly retained that discretion when she acted in petitioners’ case.” *Id.* Neither is true.

In this case, the supervisor’s discretion over the initial determination of the 20% penalty was lost by the time the December 31, 2015 letter was sent to the Swifts because that letter gave the Swifts the opportunity to immediately agree to the 20% penalties (or risk being subject to the threatened 40% penalties). Had the Swifts accepted that determination, no notice of deficiency would have ever been issued and any managerial discretion would have been lost.

3. The IRS also distances itself from Internal Revenue Manual instructions supporting the Swifts' interpretation, dismissing that guidance as "short-lived" and litigation-driven (Opp. 9). But that characterization misses the point.

The Internal Revenue Manual tracked the Tax Court's approach, requiring supervisory approval before formal communications that allow a taxpayer to agree to penalties—precisely the situation here. And that rule reflects common sense: once a taxpayer can accept a penalty, the determination is operative. The taxpayer may very well yield to the threat, in which case no notice of deficiency will ever issue, and no supervisor will ever have a meaningful opportunity to reject the penalty.

But more importantly, the IRS's need to revise its rules reflects ongoing uncertainty about when supervisory approval must occur. To be sure, the IRS is correct that the Internal Revenue Manual is not binding on courts. But the Supreme Court "has long said that courts may consider the consistency of an agency's views when [it] weigh[s] the persuasiveness of any interpretation it offers in court." *Bittner v. United States*, 598 U.S. 85, 97 (2023) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). When the IRS issues guidance at odds with the interpretation it subsequently asks the Court to adopt, "that counts as yet one more reason yet to question whether its current position represents the best view of the law." *Id.* Here, the IRS's own construction of section 6751(b) which guided revenue agents for years represents the best construction of the statute.

4. Finally, the IRS resists application of *Acker*, arguing that lenity has no role because there is no

“grievous ambiguity” in § 6751(b). Opp. 10. That claim is untenable. Courts have struggled to apply section 6751(b), producing conflicting interpretations. Moreover, this Court has questioned whether “grievous ambiguity” is the proper standard in any event. *See Wooden v. United States*, 595 U.S. 360, 392 (2022) (Gorsuch, J., concurring) (this “‘grievous’ business does not derive from any well-considered theory about lenity or the mainstream of this Court’s opinions”). *Acker* remains good law and reinforces the conclusion that the IRS’s reading should be rejected.

III. The IRS’s arguments regarding vehicle suitability are wrong.

The IRS reprises its earlier arguments to claim this case is a poor vehicle. Those contentions fail for the reasons already discussed. More fundamentally, neither asserted defect would prevent this Court from resolving the question presented.

Congress enacted section 6751(b) to ensure fairness in the audit process by requiring supervisory approval of the “initial determination”. The record here cleanly presents that issue. The IRS communicated a penalty determination that the Swifts could immediately accept (while threatening higher penalties if they refused) before any supervisor approved it. The Swifts declined, and the IRS followed through with a different, final determination. There is no factual dispute. The only question is when supervisory approval is required.

That makes this case an ideal vehicle to decide whether an unapproved threat which taxpayers can accept is an

“initial determination” requiring supervisory approval or whether the statute incorporates a silent discretionary bound that reduces the protection to a perfunctory rubber stamp.

The issue here is of exceptional importance. There has already been at least one *pro se* taxpayer from the Tenth Circuit who sought Supreme Court review, *Minemyer v. Commissioner*, 144 S. Ct. 182 (2023) (No. 23-4), and there is at least one other taxpayer from the Eleventh Circuit with the same issue pending before the Supreme Court, *Battat v. Commissioner*, No. 25-719 (filed Dec. 15, 2025).

Amicus has likewise filed an excellent brief in support of this petition describing the outsize impact the issue presents as well as thorough reasons why certain courts have failed to interpret the statute correctly.

The undisputed facts here reflect the precise problem Congress set out to solve. A penalty was proposed, conveyed to the taxpayers as something that may be accepted, and accompanied by the suggestion of something worse to come—all before any supervisor had approved it. The question is whether the statute operates as written or instead collapses into a formality that arrives only after the pressure has already been applied. With the IRS and the courts advancing competing answers, the statute now means different things in different places. That is not how a uniform federal tax law is supposed to work. Only this Court can supply the clarity the statute requires.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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