NO. 25-

IN THE

Supreme Court of the United States

STANLEY BATTAT AND ZMIRA BATTAT,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Internal Revenue Code Section 6751(b)(1) provides that "[n]o 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 question presented:

Is a formal written communication from the IRS informing a taxpayer that penalties have been determined to apply and that solicits payment of those penalties an "initial determination" that requires written managerial approval under Section 6751(b)?

RELATED PROCEEDINGS

- *Battat v. Comm'r*, No. 17784-12, United States Tax Court. Decision entered July 30, 2024.

- *Battat v. Comm'r of Internal Revenue*, No. 24-13401, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered September 16, 2025.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Stanley Battat and Zmira Battat, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (hereinafter, the "Court of Appeals") is unpublished, is cited as *Battat v. Comm'r of Internal Revenue*, No. 24-13401, 2025 WL 2652443 (11th Cir. Sept. 16, 2025), and is reproduced in the Appendix herein at App. 1a-18a.

The Tax Court's May 11. 2021, memorandum opinion, cited as *Battat v. Comm'r*, T.C. Memo. 2021-57, 2021 WL 1885931 (2021), and associated order granting Petitioner's motion for partial summary judgment are reproduced in the Appendix herein at App. 37a-42a and App. 36a, respectively.

The Tax Court's March 29, 2024, order, *inter alia*, vacating T.C. Memo. 2021-57, is reproduced in the Appendix herein at App. 20a-35a. And the Tax Court's order and decision is reproduced in the Appendix herein at App. 19a.

JURISDICTION

The opinion of the Court of Appeals that affirmed the Tax Court's decision was entered on September 16, 2025. The present petition is being filed by postmark on or before December 15, 2025. This

Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

26 U.S.C. § 6751(b)(1) provides, in full: "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."

STATEMENT

This case comes to this Court from the Court of Appeals' affirmance of the Tax Court's entry of a stipulated decision —expressly preserving Petitioners' rights to appeal— imposing tax penalties.

Petitioners moved for partial summary judgment, asserting that assessment of the accuracy-related tax penalties was precluded due to the Government's violation of Section 6751(b). Applying its own statutory interpretation, the Tax Court agreed and granted summary judgement because the Revenue Agent Report ("RAR") determining the penalties was provided to Petitioners prior to written manager approval.

The Tax Court reasoned that "[p]roviding the opportunity to consent to assessment of tax and penalty is a consequential moment to a taxpayer and the Commissioner. A signed, completed RAR sent with a Letter 4121 provides the requisite definiteness and formality to constitute an 'initial determination' for

purposes of section 6751(b)(1)." *Battat*, 2021 WL 1885931, at *2 (cleaned up); App. 38a.

However, the Court of Appeals subsequently issued *Kroner v. Comm'r of Internal Revenue*, 48 F.4th 1272 (11th Cir. 2022), which parted with the Tax Court's interpretation that it had applied and expressly "rejected the reasoning of a Second Circuit decision that reached a different outcome." *Battat*, 2025 WL 2652443, at *5; App. 13a (citing *Kroner,* 48 F. 4th at 1279-81). Applying the "*Golsen* Rule" that the law of the circuit to which an appeal lies controls (*see Golsen v. Comm'r of Internal Revenue*, 54 T.C. 742 (1970), *aff'd sub nom. Golsen v. C. I. R.*, 445 F.2d 985 (10th Cir. 1971)), the Tax Court vacated its grant of partial summary judgment, explaining: "*Golsen* requires that we follow *Kroner*, regardless of whether this Court would reach the same conclusion." App. 33a.

The Tax Court entered the stipulated decision, preserving Petitioners' rights, *inter alia*, to appeal the denial of partial summary judgment as to the accuracy-related penalties under Section 6751(b).

The Court of Appeals applied its reasoning under "*Kroner* and conclude[d] that the Commissioner did not violate § 6751(b)(1)." *Battat*, 2025 WL 2652443, at *7; App. 17a.

The instant petition follows.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS FROM THE SECOND, NINTH, AND TENTH CIRCUITS, AND THE TAX COURT.

The deeply fractured circuit split over the proper interpretation of Section 6751(b) has its roots in a Tax Court case where a taxpayer "raise[d] for the first time in his posttrial brief an argument that respondent failed to carry his burden of production by not introducing evidence of his compliance with section 6751(b)(1)." *Chai v. Comm'r*, T.C. Memo. 2015-42, 2015 WL 1062990, at *11 (2015), *aff'd in part, rev'd in part sub nom. Chai v. Comm'r of Internal Revenue*, 851 F.3d 190 (2d Cir. 2017).

The taxpayer asserted that the IRS "must introduce evidence that the individual making the penalty determination had his or her immediate supervisor approve the accuracy-related penalty in writing." *Id.* However, the Tax Court held that "argument [wa]s untimely… [and did not rule whether the] requirement is part of respondent's burden of production…." *Id.*

The Second Circuit reversed, finding "that § 6751(b)(1) written approval is an element of a penalty claim and therefore the Commissioner's burden to prove," and "it was not Chai's obligation to alert the Commissioner to the elements of his claim[.]" *Chai*, 851 F.3d at 222-23. Speaking to the substance of Section 6751(b): "If supervisory approval is to be required at all, it must be the case that the approval

is obtained when the supervisor has the discretion to give or withhold it." *Id.* at 220.

The Tax Court subsequently issued a string of decisions developing its interpretation and application of Section 6751(b). In a superseding opinion after granting a taxpayer's motion to vacate (based on the intervening decision in *Chai*), the Tax Court stated: "Under section 7491(c) the Commissioner bears the burden of production with respect to the liability of an individual for any penalty. To satisfy this burden the Commissioner must present sufficient evidence to show that it is appropriate to impose the penalty in the absence of available defenses." *Graev v. Comm'r*, 149 T.C. 485, 493 (2017).

The *Graev* majority parted with a dissenting position that "an IRS officer cannot make the initial determination of an assessment unless he or she has the technical authority[,]" noting, "neither section 6751(b) nor its legislative history refers to the technical scope of authority possessed by the person who first proposes a penalty. Congress was concerned about the bigger picture: It desired to prevent rogue IRS personnel from using penalties as leverage to extract concessions from taxpayers." *Id.* at 500 (Lauber, *J.*, concurring). *See also id.* (Lauber, *J.*, concurring) (under the rejected analysis, "an IRS official would be free to use penalties as a battering ram against taxpayers, without obtaining supervisory approval under section 6751(b), so long as he lacked authority to do what he was doing.").

Instead, the Tax Court

> adopt[ed] a more sensible approach. It treats the "initial determination of such assessment" as referring to the action of the IRS official who first proposes that a penalty be asserted.… [B]y requiring supervisory approval the first time an IRS official introduces the penalty into the conversation, the Court's interpretation is faithful to Congress' purpose by affording maximum protection to taxpayers against the improper wielding of penalties as bargaining chips.

Id. at 500–01 (Lauber, *J.*, concurring).

The Tax Court continued applying that standard, explaining, in one case, "[t]he IRS complied with section 6751(b)(1), because each penalty at issue here was initially determined and then approved in writing by a supervisor before being communicated to [the taxpayer]." *Palmolive Bldg. Invs., LLC v. Comm'r*, 152 T.C. 75, 89 (2019) (cleaned up).

Considering circumstances aligned with this case, the Tax Court explained that

> [t]he determinations made in a notice of deficiency typically are based on the adjustments proposed in an RAR.… And when those proposed adjustments are communicated to the taxpayer formally as part of a communication that advises the taxpayer that penalties will be proposed and giving the taxpayer the

> right to appeal them with Appeals (via a 30-day letter), the issue of penalties is officially on the table.

Clay v. Comm'r, 152 T.C. 223, 249 (2019), *aff'd,* 990 F.3d 1296 (11th Cir. 2021).

And the Tax Court's analysis consistently applied below:

> Providing the opportunity to consent to assessment of tax and penalty is a consequential moment to a taxpayer and the Commissioner. A signed, completed RAR sent with a Letter 4121 provides the requisite definiteness and formality to constitute an "initial determination" for purposes of section 6751(b)(1).

App. 41a (cleaned up).

However, in its subsequently issued decision, the Court of Appeals held differently:

> [Section 6751] supervisory review serves two functions: it ensures that penalties are imposed only "where appropriate," and it prevents penalties from being used only as bargaining chips during negotiation. Section 6751(b) serves its first function so long as a supervisor approves a penalty before the assessment is made; there is no need to set an earlier deadline.

Kroner, 48 F.4th at 1279.

The Court of Appeals continued:

> Second, we do not think the statute needs a pre-assessment deadline to reduce the use of improper penalties as "bargaining chip[s]." The *Chai* court understood Section 6751(b)'s purpose to be about policing *pre-assessment* settlement negotiations. But negotiations do not end after a penalty is assessed. Indeed, the IRS's probable next steps, issuing a tax lien and collecting via levy, provide taxpayers access to administrative and judicial remedies that may encourage the parties to continue negotiating long after assessment. And a taxpayer may decide to pay the penalty asserted and then sue the government for a refund, resulting in a separate but related set of negotiations.

Id. at 1280 (cleaned up).

Kroner expressly rejected the holding and reasoning of the Second Circuit and conflicts with all other Circuits to have considered the issue.

Indeed, the Tenth Circuit was "persuaded by the Second Circuit's reasoning and h[e]ld that with respect to civil penalties, the requirements of § 6751(b)(1) are met so long as written supervisory approval of an initial determination of an assessment is obtained on or before the date the IRS issues a notice of deficiency." *Minemyer v. Comm'r of Internal*

Revenue, 2023 WL 314832, at *5 (10th Cir. Jan. 19, 2023) (nonprecedential), *cert. denied,* 144 S. Ct. 182 (2023). And the Ninth Circuit "h[e]ld that § 6751(b)(1) requires written supervisory approval before the assessment of the penalty or, if earlier, before the relevant supervisor loses discretion whether to approve the penalty assessment." *Laidlaw's Harley Davidson Sales, Inc. v. Comm'r of Internal Revenue*, 29 F.4th 1066, 1073–74 (9th Cir. 2022).[1] *Kroner* did "not address this nuance because it [wa]s undisputed that the supervisor had discretion when she approved the penalties at issue [t]here." 48 F.4th at 1279 n.1.

Consistent with its precedent, *see Palmolive Bldg., supra*, the Tax Court has continued to apply its own interpretation (where appellate decisions have not been rendered) that "[a]n 'initial determination' occurs the earlier of when the Commissioner issues a notice of deficiency *or formally communicates a decision to determine penalties*." *Aldridge v. Comm'r*, T.C. Memo. 2024-24, 2024 WL 714143, at *15 (2024) (emphasis added). The Tax Court's position is faithful to the statutory text, and congressional intent as confirmed by the legislative history.

The Court should issue the writ to resolve the split in conformance with the statutory text.

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[1] The D.C. Circuit's position is unclear but implies pre-approval is required. *See Lamprecht v. Comm'r of Internal Revenue*, 98 F.4th 1132, 1140 (D.C. Cir. 2024) ("the IRS showed in tax court that a supervisor preapproved the Lamprechts' penalties in writing").

II. THE DECISION BELOW WAS WRONG.

By its terms, Section 6751(b) does not apply to an "assessment" but, rather, to the "initial determination" of a penalty assessment. As this Court repeatedly emphasizes, "[w]hen Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*). [The Court of Appeals'] interpretation defies this traditional rule of statutory construction" by treating the required approval of the "initial determination" as approval of the assessment, *Bittner v. United States*, 598 U.S. 85, 94 (2023), despite the explicit statutory distinction.

While "initial determination" is neither a term of art nor defined by statute, it necessarily precedes assessment and can be deduced by its plain terms, as it *must be*:

> The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there. Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous…. [And,] unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning….

BedRoc Ltd., LLC v. United States, 541 U.S. 176, 183-84 (2004) (cleaned up).

Indeed, *Kroner* belies the statutory language and Congress's intent – rejecting what the "*Chai* court understood[:] Section 6751(b)'s purpose to be about policing *pre-assessment* settlement negotiations." 48 F.4th at 1280 (emphasis in original). Suggesting post-assessment collection negotiations are equivalent is wrong, and the difference is palpable. Once assessment occurs, a taxpayer is liable. Post-assessment negotiations concern the manner of collection (or collection alternatives) not the liability —which is fixed upon assessment, regardless of whether improperly coerced by "rogue IRS personnel" as Congress intended to quell. *Graev*, 149 T.C. at 500 (Lauber, *J.*, concurring). *See also Chai*, 851 F.3d at 219 (discussing legislative history).

The Court of Appeals' holding requires a willful rejection of the plain meaning of the words Congress enacted, as the IRS itself stated that the penalties had "been determined" for each taxable year in the RAR. Tax Ct. Doc. # 74 (Motion for Patial Summary Judgment) Exhibit 1 p. 9 (2008), p. 20 (2009), p. 30 (2010). But this Court "cannot approve such a casual disregard of the rules of statutory interpretation. In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst. V. Argus Leader Media*, 588 U.S. 427, 436 (2019).

The IRS's standard practice using those plain terms further bolsters the Tax Court's —and fatally undermines the Court of Appeals'— interpretation. *Accord Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change… [and when] Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law…."); *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) ("Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."). And by its terms, "an 'initial determination' is logically read to mean a preliminary or tentative decision, which is … perfectly consistent with the statute." *Graev*, 149 T.C. at 501 (Lauber, *J.*, concurring).

Moreover, the Court of Appeals failed to abide by this Court's long held principle that "[i]t is elementary that tax laws are to be interpreted liberally in favor of taxpayers, and … [d]oubts must be resolved against the government and in favor of taxpayers." *Miller v. Standard Nut Margarine Co. of Fla.*, 284 U.S. 498, 508 (1932). And even more so in the instant circumstances because, when "concerned with a taxing Act which imposes a penalty, the law is settled that penal statutes are to be construed strictly, and that one is not to be subjected to a penalty unless the words of the statute plainly impose it." *Comm'r v. Acker*, 361 U.S. 87, 91 (1959) (cleaned up).

Quite evidently, as cautioned by the Second Circuit, Congress intended that when an RAR asserts a penalty, it is an "initial determination" that requires *prior approval*. Otherwise, "penalties could still be used as bargaining chips to prompt settlement negotiations and, if successful, the Tax Court would be none the wiser (since the taxpayer would have settled, rather than have filed a Tax Court petition where the propriety of the penalty could be litigated)." *Chai*, 851 F.3d at 219–20. Once that penalty determination was communicated, and the IRS solicited payment, the violation of Section 6751(b) precluded assessment. *Accord Endeavor Partners Fund, LLC v. Comm'r*, T.C. Memo. 2018-96, 2018 WL 3203127, at *22–23 (2018), *aff'd*, 943 F.3d 464 (D.C. Cir. 2019) ("Allowing respondent to cure an admitted violation of section 6751(b) by reasserting penalties in an amended pleading would frustrate Congress' purpose in enacting this statute.").

A contrary interpretation violates the statutory text, legislative intent, and conflicts with all other Circuits' reasoning. *See Chai*, 851 F.3d at 220 ("If supervisory approval is to be required at all, it must be the case that the approval is obtained when the supervisor has the discretion to give or withhold it…. It is not enough that approval be given before the Tax Court proceeding ends, however; for the supervisor's discretion to be given force, the approval must be issued before the Tax Court proceeding is even initiated."); *Minemyer*, 2023 WL 314832, at *5 ("[w]e are persuaded by the Second Circuit's reasoning"); *Laidlaw's Harley Davidson*, 29 F.4th at 1074 ("we hold that § 6751(b)(1) requires written supervisory

approval … before the relevant supervisor loses discretion whether to approve the penalty assessment."). Soliciting payment from a taxpayer necessarily meets the standard requiring *prior* written approval— if a taxpayer pays, no supervisor maintains discretion as it will have already been assessed.

Congress's use of "initial determination" forecloses satisfaction by approving the assessment or even a pre-assessment determination other than the initial one. In an instructively similar scenario, this Court explained:

> The interpretive canon that Congress acts intentionally when it omits language included elsewhere applies with particular force here for two reasons. First, Congress used "law" and "law, rule, or regulation" in close proximity— indeed, in the same sentence…. Those two aspects of the whistleblower statute make Congress's choice to use the narrower word "law" seem quite deliberate.

Dep't of Homeland Sec. v. MacLean, 574 U.S. 383, 392 (2015).

But the Court of Appeals shunned the plain meaning of the statutory language, as "an 'initial determination' is logically read to mean a preliminary or tentative decision, which is … perfectly consistent

with the statute." *Graev*, 149 T.C. at 501 (Lauber, *J.*, concurring).

Accordingly, this Court should grant certiorari to correct the error, apply the plain meaning of the statute, and resolve the circuit split so that all taxpayers are afforded the same protections Congress enacted regardless of where their litigation commences.

III. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

There can be no doubt that the IRS's statutory requirement under Section 6751(b) to assess civil tax penalties is a question of great importance that is frequently recurring. According to its own data, the IRS assessed over fifty million civil tax penalties (50,723,930) totaling over eighty-four billion dollars ($84,064,300,000) in fiscal year 2024. *See* IRS Data Book, 2024, Table 28: Civil Penalties Assessed and Abated, by Type of Tax and Type of Penalty, Fiscal Year 2024, *available at* https://www.irs.gov/pub/irs-soi/24dbs04t28cp.xlsx.

Indeed, the IRS's Taxpayer Advocate Service has identified managerial approval under Section 6751(b) to be among the most litigated issues before the Tax Court. *See* IRS, National Taxpayer Advocate, *Annual Report to Congress* 160 (2024), *available at* https://www.taxpayeradvocate.irs.gov/reports/2024-annual-report-to-congress/full-report/.

The prevalence of civil tax penalties, for which virtually all Americans are potentially subject to,

merits this Court's intervention to achieve equal treatment across all circuits, in accordance with the words of the statute Congress enacted in Section 6751.

IV. THIS CASE PRESENTS A GOOD VEHICLE.

This case presents an ideal vehicle for addressing whether Section 6751(b) was violated, as it turned on pure statutory interpretation. The Tax Court's extant interpretation was applied to the undisputed facts, until the Court of Appeals' intervening decision that likewise applied a purely legal question to the undisputed facts at issue.

Consequently, this Court's definitive construction of Section 6751(b) will resolve both the issue *sub judice* and the pervasive circuit split that presently results in wildly divergent outcomes for taxpayers simply based on the circuit in which their cases are litigated.

The case cleanly presents pure legal issues. There are no jurisdictional problems, factual disputes, or preservation issues.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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Dated: December 15, 2025

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED SEPTEMBER 16, 2025

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 24-13401
Non-Argument Calendar

STANLEY BATTAT, ZMIRA BATTAT,

Petitioner-Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Filed September 16, 2025

Petition for Review of a Decision of the
U.S. Tax Court
Agency No. 17784-12

Before LAGOA, KIDD, and BLACK, Circuit Judges.

PER CURIAM:

Stanley and Zmira Battat ("the Battats") initiated proceedings in the U.S. Tax Court to contest a determination by the Commissioner of Internal Revenue

("the Commissioner") that they owed approximately $2 million in back taxes and associated penalties for the 2008 tax year. During the proceedings, the Battats argued (1) 26 U.S.C. § 7443(f), a statutory provision permitting the President to remove a Tax Court judge only for cause, is unconstitutional based either on the President's authority to remove Executive Branch officials or on the Constitution's separation of powers, and (2) the Commissioner violated 26 U.S.C. § 6751(b)(1) because the tax examiner responsible for their case did not obtain approval from her immediate supervisor when she made the initial determination that the Battats were required to pay certain tax penalties. The Tax Court ultimately rejected both of these arguments, and the Battats appealed. After review,[1] we affirm the Tax Court.

I. BACKGROUND

In July 2012, the Battats filed in the U.S. Tax Court a petition for redetermination of deficiency of income tax liability, seeking to contest the Commissioner's determination that they owed approximately $2 million in back taxes and associated penalties for the 2008 tax year. Specifically, the Battats sought to contest a notice of deficiency mailed to them by the Commissioner on April 23, 2012, which stated they owed $1,722,175 in back taxes for the 2008 tax year, in addition to $82,337.25 in penalties for failure to file a tax return within the necessary time limit under 26 U.S.C. § 6651(a)(1) and $344,435 in

1. We review the Tax Court's legal conclusions *de novo*. *Kroner v. Comm'r of Internal Revenue*, 48 F.4th 1272, 1276 (11th Cir. 2022).

"accuracy-related" penalties for underpayment of taxes under 26 U.S.C. § 6662(a).

The Battats moved to disqualify all Tax Court judges and declare unconstitutional 26 U.S.C. § 7443(f), a provision that permits the President to remove a Tax Court judge "after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause." 26 U.S.C. § 7443(f). They argued that § 7443(f) was unconstitutional because it violated the Constitution's separation of powers. The Tax Court denied that motion, concluding that § 7443(f) did not violate separation of power principles.

The Battats also moved for partial summary judgment as to the accuracy-related penalty, arguing that penalty could not be assessed because the Commissioner failed to comply with 26 U.S.C. § 6751(b)(1), a provision requiring that the initial determination of the assessment of certain penalties be approved in writing by the immediate supervisor of the individual who makes the determination. 26 U.S.C. § 6751(b)(1). Specifically, the Battats stated that they received a letter and report on November 28, 2011, which stated, among other things, that they were required to pay $345,142.60 in accuracy-related penalties for the 2008 tax year. The forms were only signed by Internal Revenue Service ("IRS") Agent Michelle Ribaudo. The letter to the Battats stated that, if they agreed with the report, they needed to sign it and pay all owed back taxes, penalties, and interest, but, if they did not agree, they should contact the examiner.

Appendix A

In response to the Battats' summary judgment motion, the Commissioner argued that § 6751(b)(1) did not require that Ribaudo's supervisor sign the November 28 letter and report, adding that documents signed by Ribaudo's supervisor after November 28 and before the issuance of the April 23, 2012, notice of deficiency satisfied § 6751(b)(1). The Commissioner asserted that two documents satisfied § 6751(b)(1) in this case: (1) a civil penalty approval form, which was signed on December 8, 2011, by Larry Stagliano, who was acting group manager on that day for Ribaudo's assigned supervisor, Angela Krumenacker, and (2) a letter sent to the Battats on December 8, 2011, discussing an examination report with proposed changes to the Battats' tax liability and penalties, which Stagliano stated he signed "in the name of" Krumenacker.

The Tax Court initially granted the Battats' summary judgment motion because it found that the Commissioner had violated § 6751(b)(1). It concluded that, for the accuracy-related penalty to be assessed, § 6751(b)(1) required that the November 28, 2011, report and letter be approved by Ribaudo's supervisor because it constituted the "initial determination" of the penalty.

The Commissioner moved for reconsideration of the grant of partial summary judgment. The Commissioner argued that the Tax Court's order was contrary to *Kroner v. Comm'r of Internal Revenue*, 48 F.4th 1272 (11th Cir. 2022), a case decided after the Tax Court's order, in which we held that § 6751(b)(1) is satisfied as long as a supervisor approves an initial determination of a penalty assessment before the penalty is assessed.

The Battats then moved for a second time for the Tax Court to declare § 7443(f) unconstitutional, raising the alternative argument that, if the Tax Court was part of the Executive branch, then the for-cause removal requirement in § 7443(f) unconstitutionally limited the President's authority to remove Executive Branch officials. The Tax Court denied the Battats' motion, concluding based on its earlier order that § 7443(f) was constitutional and rejecting the Battats' alternative arguments. Then, the court granted the Commissioner's motion to reconsider its summary judgment order and vacated that order. It reasoned that *Kroner* required that it reach a different conclusion from its first order, noting that our precedent was binding on it because the case was appealable to us.

The Battats then moved for the Tax Court to enter a decision consistent with the notice of deficiency because they stipulated to the allegations in the notice. However, they stated that they preserved their right to appeal the orders denying their motions for partial summary judgment and to declare § 7443(f) unconstitutional. On July 30, 2024, the Tax Court entered an order and decision finding the Battats liable for the amount described in the notice of deficiency pursuant to the stipulation.

The Battats filed a notice of appeal.

II. DISCUSSION

The Battats first argue that the Tax Court erred by rejecting their constitutionality challenge as to § 7443(f). Second, they argue that the Tax Court erred by denying

its motion for partial summary judgment because the Commissioner violated § 6751(b)(1). We address each argument in turn.

A. Constitutionality of § 7443(f)

The Battats' constitutional argument is based on two alternative positions. On the one hand, if the Tax Court is part of the Executive Branch, they contend that § 7443(f)'s for-cause removal requirement violates the President's Article II authority to remove Executive Branch officials. On the other hand, if the Tax Court is not part of the Executive Branch, they contend that § 7443(f) violates the Constitution's separation of powers because it authorizes the President to remove officials belonging to another branch.

We decline to address these constitutional arguments because the Battats have failed to show they suffered any compensable harm stemming from the asserted unconstitutionality of § 7443(f). *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445-46, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them. . . . This principle required the courts below to determine, before addressing the constitutional issue, whether a decision on that question could have entitled respondents to relief beyond that to which they were entitled on their statutory claims. If no additional relief would have been warranted, a constitutional decision would have been unnecessary and

therefore inappropriate." (citations omitted)); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (explaining that courts "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of"); *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1291 (11th Cir. 2021) (stating that we will not address a constitutional argument "in keeping with the judicial restraint princip[les] of constitutional avoidance" when the resolution of alternative issues renders such an argument "a wholly academic question").

In *Collins v. Yellen*, the Supreme Court considered a constitutional challenge to a statutory restriction on the President's power to remove the Director of the Federal Housing Finance Agency ("FHFA"). 594 U.S. 220, 242, 141 S. Ct. 1761, 210 L. Ed. 2d 432 (2021). After the Court concluded that the removal provision violated the separation of powers, it considered whether the appellants had a proper request for relief. *Id.* at 250-57. It noted that the appellants' sole request for relief was retrospective: They sought to undo an action taken by the FHFA that they claimed had harmed them. *Id.* at 257.

The Court rejected an argument that the challenged action was "void *ab initio*" merely because the President's authority to remove the FHFA Director was unconstitutionally limited since there was no constitutional defect as to the appointment of the Director. *Id.* at 257-58. It explained that this did not mean that the appellants had no potential entitlement to retrospective relief because it

was "possible for an unconstitutional [removal] provision to inflict compensable harm." *Id.* at 259. The Court provided two examples of how such harm might occur: It reasoned that an unconstitutional removal provision could cause compensable harm if (1) "the President had attempted to remove a Director but was prevented from doing so by a lower court decision holding that he did not have 'cause' for removal," or (2) "the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way." *Id.* at 259-60. Ultimately, because it was not clear in the case before it whether the appellants had suffered compensable harm as a result of the unconstitutional removal provision, the Court remanded for further proceedings on that issue. *Id.* at 260-61.

In *Rodriguez v. Soc. Sec. Admin.*, we applied *Collins*' discussion of compensable harm to a constitutional challenge to a statutory provision regarding the removal of the Commissioner of Social Security, members of the Social Security Appeals Council, and Social Security Administration Administrative Law Judges ("ALJs") in an appeal of a denial of Social Security benefits. 118 F.4th 1302, 1314-1315 (11th Cir. 2024). We did not address the constitutionality of the removal provisions as to the Appeals Council members or the ALJs because the appellant failed to show how those provisions caused him any harm. *Id.* After noting that, like in *Collins*, there was no question that the relevant officials were properly appointed, we stated, "[t]here is nothing in the record which suggests, for example, that the Commissioner or the

President were considering dismissing or terminating the ALJ who adjudicated [the appellant's] case (or the Appeals Council members who denied review) but were prevented from doing so by the for-cause removal provisions." *Id.* at 1315. Further, relying on a Ninth Circuit case addressing *Collins*, we did not remand the case for further proceedings like the Supreme Court did in *Collins* because the appellant failed to submit any evidence or provide any arguments that he was harmed by the removal provisions. *Id.* (citing *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137 (9th Cir. 2021)).

We conclude under *Collins* and *Rodriguez* that, even if the Battats are correct that § 7443(f)'s for-cause removal requirement is unconstitutional, they are not entitled to relief because they have failed to show that they have suffered any compensable harm as a result of the asserted unconstitutionality of § 7443(f). *See Collins*, 594 U.S. at 257-60; *Rodriguez*, 118 F.4th at 1314-15. Like in *Rodriguez*, the Battats have failed to provide any evidence or arguments that they were harmed by § 7443(f), so remand is not warranted as it was in *Collins*. *See Collins*, 594 U.S. at 260-61; *Rodriguez*, 118 F.4th at 1315.

This conclusion is consistent with how other courts of appeals have applied *Collins* in similar contexts. *See, e.g.*, *Leachco, Inc. v. Consumer Prod. Safety Comm'n*, 103 F.4th 748, 755-58 (10th Cir. 2024) ("To establish harm under *Collins*, [the appellant] would need to make a showing that the challenged removal provisions actually impacted, or will impact, the actions taken by the [appellee] against it."); *Calcutt v. FDIC*, 37 F.4th 293, 313-17 (6th Cir. 2022)

("*Collins* thus provides a clear instruction: To invalidate an agency action due to a removal violation, that constitutional infirmity must 'cause harm' to the challenging party."), *rev'd on other grounds by* 598 U.S. 623, 143 S. Ct. 1317, 215 L. Ed. 2d 557 (2023); *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 631-33 (5th Cir. 2022) ("We distill from [*Collins*'] hypotheticals three requisites for proving harm: (1) a substantiated desire by the President to remove the unconstitutionally insulated actor, (2) a perceived inability to remove the actor due to the infirm provision, and (3) a nexus between the desire to remove and the challenged actions taken by the insulated actor."), *rev'd on other grounds by* 601 U.S. 416, 144 S. Ct. 1474, 218 L. Ed. 2d 455 (2024).

In *Walmart, Inc. v. Chief Admin. L. Judge of Off. of Chief Admin. Hearing Officer*, an appeal concerning the constitutionality of a statutory provision regarding the removal of ALJs in the Department of Justice, we addressed the merits of the constitutional arguments because we concluded that the case before us was distinct from *Rodriguez*. 144 F.4th 1315, 1337-39, 1342-48 (11th Cir. 2025). We concluded that *Rodriguez*'s application of *Collins* did not apply because the appellant sought only prospective relief, and the district court had declared the removal provision unconstitutional. *Id.* at 1338-39. As to the latter point, we explained "[s]imply vacating the district court's remedy [under *Rodriguez*] without addressing the merits of the constitutional issue would not be appropriate here." *Id.* at 1339.

This appeal is more like *Rodriguez* than *Walmart* because the Battats seek retrospective relief—the reversal

of the Tax Court's final order and decision and new proceedings before a different judge—and the Tax Court did not declare § 7443(f) unconstitutional. *See Rodriguez*, 118 F.4th at 1314-15; *Walmart*, 144 F.4th at 1338-39. Therefore, like in *Rodriguez*, we decline to address the merits of the Battats' constitutional arguments.

The Battats argue that they do not need to prove harm based on language from *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 140 S. Ct. 2183, 207 L. Ed. 2d 494 (2020), another case addressing the constitutionality of a removal provision. In that case, the Supreme Court stated,

> We have held that a litigant challenging governmental action as void on the basis of the separation of powers is not required to prove that the Government's course of conduct would have been different in a "counterfactual world" in which the Government had acted with constitutional authority. . . . In the specific context of the President's removal power, we have found it sufficient that the challenger "sustain[s] injury" from an executive act that allegedly exceeds the official's authority.

Seila Law, 591 U.S. at 211 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 512 n.12, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010), and *Bowsher v. Synar*, 478 U.S. 714, 721, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986)).

However, the Supreme Court rejected a similar argument in *Collins*, stating that neither *Seila Law* nor

Bowsher stood for the proposition that a governmental action could be voided simply because of an unconstitutional removal provision. *See Collins*, 594 U.S. at 258-59; *see also id.* at 258 n.24 ("We held [in *Seila Law*] that a plaintiff that challenges a statutory restriction on the President's power to remove an executive officer can establish standing by showing that it was harmed by an action that was taken by such an officer and that the plaintiff alleges was void. . . . But that holding on standing does not mean that actions taken by such an officer are void *ab initio* and must be undone." (citation omitted)).

For these reasons, we affirm the Tax Court's denial of the Battats' constitutional challenge to § 7443(f).

B. Supervisor Approval

The Battats also argue that the Commissioner violated § 6751(b)(1) because the November 28, 2011, letter and report constituted the initial determination of the accuracy-related penalty but was not approved by the examiner's immediate supervisor. We disagree because this argument is foreclosed by *Kroner*.

Section 6751(b)(1) states, "[n]o 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." 26 U.S.C. § 6751(b)(1). There are certain exceptions to that rule, but it applies to § 6662(a) accuracy-related penalties based on underpayment of income tax in various circumstances. *Id.* § 6751(b)(2).

Appendix A

In *Kroner*, a taxpayer received a letter from a tax examiner stating he owed back taxes and penalties, which was not signed by the examiner's supervisor. *Kroner*, 48 F.4th at 1274. Subsequently, the examiner's supervisor sent the taxpayer a signed letter approving the penalties discussed in the first letter. *Id.* When negotiations failed, the IRS sent the taxpayer a notice of deficiency, and the taxpayer initiated Tax Court proceedings. *Id.* The Tax Court concluded that the imposition of the specified penalties was contrary to § 6751(b)(1) because that provision required supervisor approval at the time of the first letter. *Id.*

We held that the Tax Court erred because "the IRS satisfies Section 6751(b) so long as a supervisor approves an initial determination of a penalty assessment before it assesses those penalties." *Id.* at 1276. First, we reasoned that "the initial determination of such assessment" described in § 6751(b)(1) "has nothing to do with communication and everything to do with the formal process of calculating and recording an obligation on the IRS's books," which meant that the first letter did not constitute an "initial determination" for purposes of § 6751(b)(1). *Id.* at 1277-78. Second, we rejected the argument "that an IRS supervisor must approve the initial determination of assessment before any penalty is communicated to the taxpayer" because we saw "nothing in the text [of § 6751(b)(1)] that requires a supervisor to approve penalties at any particular time before assessment." *Id.* at 1278-79. Lastly, we rejected the reasoning of a Second Circuit decision that reached a different outcome. *Id.* at 1279-81. For those reasons, we

reversed the Tax Court's order disallowing the penalties. *Id.* at 1281.

The facts of this case are identical to *Kroner*. Like in *Kroner*, the Battats initially received a letter from a tax examiner describing certain penalties to be imposed, which was not signed by the examiner's supervisor. *Id.* at 1274. Then, before the IRS issued a notice of deficiency, the Battats received an additional letter signed by the examiner's acting supervisor, and the supervisor signed a form approving the penalties. *Id.* We are bound to reject the Battats' argument based on our holding in *Kroner* that "the IRS satisfies Section 6751(b) so long as a supervisor approves an initial determination of a penalty assessment before it assesses those penalties." *Id.* at 1276.

The Battats' arguments on this issue for the most part are based on the contention that *Kroner* was wrongly decided. However, under the prior-panel-precedent rule, we must follow *Kroner* because it has not been overruled or abrogated by this Court sitting *en banc* or the Supreme Court. *See Sabal Trail Transmission, LLC v. 18.27 Acres of Land in Levy Cnty.*, 59 F.4th 1158, 1164 (11th Cir. 2023) ("[W]e have categorically rejected any exception to the prior panel precedent rule based upon a perceived defect in the prior panel's reasoning or analysis as it relates to the law in existence at that time." (alteration and quotation marks omitted)).

The Battats contend that *Kroner* is contrary to our earlier decision in *Huff v. Comm'r of IRS*, 743 F.3d 790 (11th Cir. 2014), because that case requires us to follow

out-of-circuit precedent in tax cases where our caselaw is contrary to prevailing out-of-circuit precedent. This argument is contrary both to the prior-panel-precedent rule and *Huff* itself. The Battats point to language in *Huff* where we stated that the Tax Court decision on review "produced a split of authority in an area of law in which uniformity is of particular importance," and explained that we would consider the appeal "[w]ith the benefit of our sister courts' reasoning." *Huff*, 743 F.3d at 795. However, nothing in that decision stands for the proposition that we *must* follow out-of-circuit precedent even though there is on-point, binding precedent from our circuit that requires the opposite conclusion. *See id.* at 795-802. In fact, nothing in *Huff* indicates that we are ever bound to follow out-of-circuit caselaw under these circumstances. *See id.*

The Battats also note that in *Kroner* we declined to address an argument from the Commissioner that the word "approve" in § 6751(b)(1) may impose a timing requirement on supervisor approval under that provision "because a supervisor cannot 'approve' something after she has lost the discretion to disapprove it." *Kroner*, 48 F.4th at 1279 n.1. They assert that we did not consider that issue in *Kroner* because in that case it was "undisputed that the supervisor had discretion when she approved the penalties at issue here," while in this case they contest whether the supervisor had discretion to approve the accuracy-related penalties in the December 8, 2011, letter and civil penalty approval form. *Id.* Their argument is that the supervisor lost discretion to approve the penalties after the issuance of the November 28, 2011, letter and report because the letter stated that, if they agreed with

the report, they could sign it and pay all tax, penalty, and interest.

Even if *Kroner* did not bind us on this issue, and even if we accepted that a supervisor cannot approve a penalty for purposes of § 6751(b)(1) once he has lost the discretion to do so, we would still reject this argument because there is no indication that the supervisor in this case lacked the discretion to approve the accuracy-related penalties when he did so on December 8, 2011.

Other courts of appeals that have considered when a supervisor loses the discretion to approve a penalty for purposes of § 6751(b)(1) have agreed that the first major event that impacts such discretion is the issuance of a notice of deficiency. *See Laidlaw's Harley Davidson Sales, Inc. v. Comm'r of Internal Revenue*, 29 F.4th 1066, 1071 & n.4 (9th Cir. 2022) (explaining that a supervisor had the discretion to approve a penalty when he signed a civil penalty approval form before the notice of deficiency was issued, and explaining, "once the notice [of deficiency] is sent, the Commissioner begins to lose discretion over whether the penalty is assessed" (citing 26 U.S.C. § 6213(c)); *Swift v. Comm'r of Internal Revenue*, 144 F.4th 756, 769-71 (5th Cir. 2025) (agreeing with *Laidlaw's*); *Chai v. Comm'r of Internal Revenue*, 851 F.3d 190, 221 (2d Cir. 2017) ("[B]ecause a taxpayer can file a tax court petition at any time after receiving a notice of deficiency, the truly consequential moment of approval is the IRS's issuance of the notice of deficiency (or the filing of an answer or amended answer asserting penalties [in response to a taxpayer's petition to commence Tax Court

proceedings])."). No binding or persuasive authority supports the Battats' position that the November 28, 2011, letter or report deprived the supervisor in this case of the discretion to approve the accuracy-related penalties.

It is possible that a supervisor might lose discretion to approve a tax penalty if, in response to a letter and report like the ones the Battats received on November 28, 2011, the taxpayer agrees to pay the calculated back taxes and penalties because at that point the supervisor might be no longer able to rescind the penalties. However, even if that is the case, that did not happen here, so we cannot say that the supervisor in this case lacked discretion to approve of the penalties on December 8, 2011, before assessment and the issuance of the notice of deficiency. *See Laidlaw's*, 29 F.4th at 1071 & n.4; *Swift*, 144 F.4th at 769-71; *Chai*, 851 F.3d at 221.

For these reasons, we reach the same conclusion as we did in *Kroner* and conclude that the Commissioner did not violate § 6751(b)(1). *See Kroner*, 48 F.4th at 1276-81. Accordingly, we affirm the Tax Court's denial of the Battats' motion for partial summary judgment as to the accuracy-related penalties.

III. CONCLUSION

The Battats cannot pursue their constitutional challenge to § 7443(f) because they have failed to show they were harmed by that provision. Further, the Commissioner complied with § 6751(b)(1) because a

supervisor approved the accuracy-related penalties before assessment. Therefore, we affirm the Tax Court.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES TAX COURT, FILED JULY 30, 2024

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Docket No. 17784-12

STANLEY BATTAT & ZMIRA BATTAT,

Petitioners,

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER AND DECISION

On July 29, 2024, the petitioners filed a Motion for Entry of Decision. For the reasons set forth in their Motion, it is

ORDERED that petitioners' Motion for Entry of Decision filed July 29, 2024, is granted. It is further

ORDERED and DECIDED that there is a deficiency in income tax due from petitioner for the taxable year 2008 in the amount of $1,722,175.00; that there is an addition to tax due from petitioner for the taxable year 2008, under the provisions of I.R.C. § 6651(a)(1), in the amount of $82,337.25; and that a penalty is due from petitioner for the taxable year 2008, under the provisions of I.R.C. § 6662(a), in the amount of $344,435.00.

(Signed) Ronald L. Buch
Judge

APPENDIX C — ORDER OF THE UNITED STATES TAX COURT, FILED MARCH 29, 2024

UNITED STATES TAX COURT
MARCH 29, 2024, DECIDED

Docket No. 17784-12.

STANLEY BATTAT & ZMIRA BATTAT,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ORDER

Pending before the Court is the Commissioner's Motion to Vacate Order Served September 24, 2021, and the Commissioner's Motion for Leave to File Motion for Reconsideration of Findings and Opinion Out of Time. Along with the latter motion, the Commissioner lodged a Motion for Reconsideration of Findings and Opinion, asking us to reconsider T.C. Memo. 2021-57. All of these motions were filed well beyond the 30 days permitted by Rules 161 and 162. The Battats oppose the Motions as being untimely and on their merits.

It is within the Court's discretion to waive a nonjurisdictional deadline. And reconsideration is appropriate when there has been an intervening change

in controlling law. Since we issued our opinion in 2021, there has been an intervening change in controlling law. Accordingly, we will grant the Commissioner's Motion for Leave, grant the Commissioner's Motion to Vacate, and file and grant the Commissioner's Motion for Reconsideration.

Background

This case involves the 2008 income tax liability of Stanley and Zmira Battat. In addition to determining a tax deficiency, the Commissioner asserted an addition to tax and accuracy related penalties.

I. Examination and Adjustments

On November 28, 2011, an Internal Revenue Agent sent the Battats a cover letter and a series of enclosures. The cover letter, Letter 4121, referred to "findings" in an "enclosed report" commonly referred to as a Revenue Agent's Report or RAR. The enclosures included a Form 4549, Income Tax Examination Changes, which detailed how the Commissioner recomputed the Battat's tax liabilities for 2008 and other years. Page 2 of that form included an addition to tax for failure to file under section 6651(a)(1) and an accuracy-related penalty under section 6662. The bottom of that page bears the typewritten "Examiner's Signature" of the Revenue Agent, also dated November 28, 2011. Other pages provide details regarding the computation of the penalties.

On December 8, 2011, the Commissioner sent the Battats what is often referred to as a 30-day letter.

That letter provides the recipient an opportunity to seek an administrative appeal of the Commissioner's determinations. Like the previous letter, this letter "enclosed an examination report." This letter, however, was signed *on behalf of* a Supervisory Internal Revenue Agent. It was signed "on behalf of" a Supervisory Internal Revenue Agent because the "Group Manager" who serves in that role was on leave that day. In her absence, however, she had appointed an acting group manager. The acting group manager signed the 30-day letter in the name of the Supervisory Internal Revenue Agent and placed his initials next to that signature.

The acting group manager signed another document relating to this case on that same day. The Revenue Agent prepared a Civil Penalty Approval Form dated November 17, 2011. That form stated that the Revenue Agent "is assessing the Substantial Understatement Penalty." The acting group manager signed that form under the heading "Group Manager Approval to Assess Penalties identified Above IRM 20.1.5.1.6." His signature was dated December 8, 2011.

On April 23, 2012, the Commissioner issued a notice of deficiency to the Battats determining a deficiency in tax, an addition to tax for failure to file, and an accuracy-related penalty for 2008, the only year that is now before us. While residing in Florida, they filed a timely petition.

II. Prior Motions, Opinion, and Order

On May 8, 2019, the Battats filed a Motion for Partial Summary Judgment and a Memorandum in Support

asking the Court to determine that the accuracy-related penalty was not properly approved under section 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.

In their Motion, the Battats made three separate arguments as to why the supervisory approval in this case was insufficient. First, they argue that approval was untimely because it occurred after the Commissioner sent the RAR to the Battats. They argue that the RAR was the "initial determination" under section 6751(b). Second, the Battats argue that, even if approval was timely, it was ineffective because it was done by an acting supervisor. And third, the Battats argue that, even if approval was timely and an acting supervisor is sufficient, that the approval did not undergo any meaningful review.

The Battats' motion was fully briefed by the parties. The Commissioner filed his Objection, and the Battats sought and were granted leave to file a Reply and Memorandum in Support of that Reply. The Battats also filed a Motion for Oral Argument.

On May 11, 2021, the Court issued a memorandum opinion deciding the Battats' Motion for Partial Summary Judgment in their favor. *Battat v. Commissioner*, T.C. Memo. 2021-57. In that opinion, we wrote

> The RAR includes the [Revenue Agent]'s initial determination and, because no supervisor approval was provided before the RAR was issued to petitioners, the penalty did not meet the requirements of section 6751(b).

On September 24, 2021, we entered our Order granting the Battats' Motion for Partial Summary Judgment.

III. Pending Motions

On June 27, 2023, the Commissioner filed and lodged a series of motions. He filed a Motion to Vacate Order Served September 24, 2021, which was the order granting the Battats' Motion for Partial Summary Judgment. He also filed a Motion for Leave to File Out of Time Motion for Reconsideration of Findings or Opinion Pursuant to Rule 161. With that motion, the Commissioner lodged his Motion for Reconsideration of Findings or Opinion Pursuant to Rule 161, which asked that we reconsider our opinion, T.C. Memo. 2021-57. The Commissioner's motions are predicated on recent developments in the caselaw interpreting section 6751(b).

The Battats oppose the Commissioner's motions on two grounds. First, the Battats observe that the Commissioner's motions are filed outside the time contemplated by this Court's rules governing vacatur and reconsideration. And second, the Battats argue that the recent caselaw interpreting section 6751(b) is wrongly decided.

Appendix C

Discussion

In T.C. Memo. 2021-57, we held that, because the penalty at issue in this case was not approved before the RAR was provided to the Battats, the penalty approval was not timely under section 6751(b). The Commissioner asks us to vacate our order giving effect to that opinion and to grant leave to file a motion for reconsideration. The Battats object. We will look first to our rules regarding vacatur and reconsideration before turning to the merits of the motion for reconsideration.

I. Vacatur

The Tax Court does not have a specific rule governing vacating an order. The closest rule we have is Rule 162, which provides

> Any motion to vacate or revise a decision, with or without a new or further trial, shall be filed within 30 days after the decision has been entered, unless the Court shall otherwise permit.

In Tax Court parlance, a decision is typically viewed as the document that conclusively resolves a case, akin to a judgment in Federal District Court. A "report" includes the Court's findings of fact or opinion. I.R.C. § 7459(b). In contrast, a decision is entered giving effect to a report. I.R.C. § 7459(a). A decision in a deficiency case typically specifies the amount of the deficiency. I.R.C. § 7459(c). And an order dismissing a case is also considered a "decision"

because it conclusively resolves a case. *Id.*; *see also*, *Foley v. Commissioner*, No. 23-1296, 95 F.4th 740, 2024 U.S. App. LEXIS 5993, at *4 (2d Cir. Mar. 13, 2024) ("'decision' as used in the Internal Revenue Code, including § 7463(b), encompasses jurisdictional dismissals...."). But the Commissioner isn't asking us to vacate a decision; he is asking us to vacate an order.

In the absence of a rule regarding vacating an order, we can look to the Federal Rules of Civil Procedure. Our Rule 1(b) provides,

> If the Rules provide no governing procedure, the Court or the Judge before whom the matter is pending may prescribe the procedure, giving particular weight to the Federal Rules of Civil Procedure to the extent that they are suitably adaptable to govern the matter at hand.

The Federal Rules of Civil Procedure provides guidance by way of Rule 60, Relief from a Judgment or Order. That rule permits a court to grant relief from an order where there is a mistake or for any reason that justifies relief. Fed. R. Civ. P. 60(b)(1), (6). The Eleventh Circuit, the circuit to which this case is appealable, has held that mistake can include a mistake in the application of law. *Parks v. U. S. Life & Credit Corp.*, 677 F.2d 838, 840 (11th Cir. 1982). It is also well recognized that a court may reconsider legal questions previously decided in the same case if controlling legal authority has changed significantly. Bryan A. Garner et al., *The Law of Judicial Precedent* 480 (2016). For reasons discussed more fully

below, controlling legal authority has changed significantly thereby justifying relief from our September 24, 2021, Order.

II. Reconsideration

Tax Court Rule 161 governs reconsideration of findings or opinions. It provides,

> Any motion for reconsideration of an opinion or findings of fact ... must be filed within 30 days after a written opinion ... [has] been served, unless the Court orders otherwise.

Although this Rule is found in title XVI, addressing posttrial proceedings, we have previously held that such motions may be filed with regard to interlocutory orders or opinions. *Bedrosian v. Comm'r*, 144 T.C. 152, 156 (2015), *aff'd*,940 F.3d 467 (9th Cir. 2019). We typically grant motions for reconsideration only if there is a substantial error or an unusual circumstance. *Id.* citing *CWT Farms, Inc. v. Commissioner*, 79 T.C. 1054, 1057 (1982), *supplementing*, 79 T.C. 86 (1982), *aff'd*, 755 F.2d 790 (11th Cir. 1985).

As for the timeliness, our Rule 161 gives the judge discretion whether to "order otherwise" as to the deadline for filing a motion for reconsideration. When considering whether to grant leave to file a motion out of time, we may consider the merits of the underlying motion for which leave is sought. *Bedrosian*, 144 T.C. at 155. To do so necessitates that we revisit the Battats' Motion for Partial Summary Judgment.

III. Motion for Partial Summary Judgment

The Battats' Motion for Partial Summary Judgment was directed solely at the question of whether the Commissioner properly approved the accuracy-related penalty for 2008. The Battats offered three reasons why the penalty determined in the Commissioner's notice of deficiency was not properly approved. We only reached the first of these three arguments, holding that the Commissioner did not approve the penalty in a timely manner. It is this holding at which the lodged Motion for Reconsideration is directed.

A. Timely Approval

A specific approval requirement for certain penalties has long existed in the Code, but it had not been addressed in litigation until *Graev v. Comm'r*, 147 T.C. 460 (2016). Since we issued that opinion, the caselaw has continually evolved. We will recount a bit of that history.

1. Section 6751(b)

Section 6751 was added to the Code by the IRS Restructuring and Reform Act of 1998. Pub. L. 105-206, 112 Stat. 744, § 3306(a) (July 22, 1998). That section added to the Code a new requirement that penalties be subject to supervisory approval. As in effect for the year in issue, that section 6751(b) provided:

> 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.

More than a decade went by before section 6751(b) was so much as mentioned in an opinion of this Court. This changed with a series of cases decided over 2016 and 2017.

2. *Graev*, *Chai*, and *Graev* revisited

In 2016, we decided *Graev v. Comm'r*, 147 T.C. 460 (2016), in which we were presented with the question of whether the penalties asserted in that case were properly approved. We held that section 6751(b) requires supervisory approval before assessment is made and that any question about that approval was premature during the deficiency case. *Id.* at 480-81. Several judges dissented. *Id.* at 503-26.

A few months later, the United States Court of Appeals for the Second Circuit decided *Chai v. Comm'r*, 851 F.3d 190 (2d Cir. 2017), *aff'g in part, rev'g in part*, T.C. Memo. 2015-42. The taxpayer in *Chai* first raised the penalty approval issue after the trial in his case. This Court declined to consider his argument because the issue was not raised in a timely manner. But on appeal, the Second Circuit cited to the dissenting opinion in *Graev* and concluded that approval must occur "before the Tax Court proceeding is even initiated." *Chai*, 851 F.3d at 220. The Second Circuit further held that the Commissioner bears the burden of production to show proper approval. *Chai*, 851 F.3d at 221.

Like *Chai*, *Graev* was appealable to the Second Circuit. We had entered our decision in *Graev* mere days before the Second Circuit decided *Chai*, so we vacated our decision in *Graev* and invited further briefing. *Graev v. Comm'r*, 149 T.C. 485, 487 (2017). In the light of the Second Circuit's opinion in *Chai*, we reversed ourselves and held that a challenge to the supervisory approval was not premature. *Graev*, 149 T.C. at 493. We then went on to conclude that the penalty at issue was timely approved. *Graev*, 149 T.C. at 493.

3. Tax Court Precedent Regarding Timeliness

In the aftermath of *Graev*, *Chai*, and *Graev*, this Court was called upon to define and refine precisely when supervisory approval needed to occur. In *Clay v. Comm'r*, 152 T.C. 223 (2019), *aff'd*, 990 F.3d 1296 (11th Cir. 2021) we held that the Commissioner "must show that written supervisory approval was obtained before the first formal communication to the taxpayer of the initial determination to assess penalties." In that case, the 30-day letter was the first formal communication. In *Oropeza v. Comm'r*, 155 T.C. 132 (2020), we held that a Letter 5153 coupled with an RAR constituted the initial determination that required supervisory approval. And in *Beland v. Comm'r*, 156 T.C. 80 (2021), we held that a Form 4549 presented at a closing conference constituted the initial determination that required supervisory approval. In each, *Clay*, *Oropeza*, and *Beland*, the Commissioner did not obtain written supervisory approval before presenting the initial determination to the taxpayer. In contrast, in *Belair Woods LLC v. Commissioner*, 154 T.C. 1 (2020),

we held that a letter and report containing tentative, proposed adjustments and inviting the taxpayer to a conference to discuss those proposed adjustments was not definite enough to constitute a determination requiring supervisory approval.

When we issued our previous opinion in this case, T.C. Memo. 2021-57, we looked to *Belair Woods*, *Oropeza*, and *Beland* to help us decide whether the Commissioner timely obtained supervisory approval of the penalty at issue here. Like *Oropeza* and *Beland*, the Commissioner provided a signed RAR to the Battats. Unlike *Belair Woods*, the RAR was not "tentative" or "proposed." Following our existing precedent at the time, we concluded that the Commissioner did not obtain timely supervisory approval of the penalty determined against the Battats.

4. Eleventh Circuit Precedent Regarding Timeliness

As these cases were being decided, another consequential case was making its way through the system. In *Kroner v. Commissioner*, T.C. Memo. 2020-73, we followed our existing precedent in *Clay*.[1] Like *Clay*, the Commissioner communicated his penalty determination to Mr. Kroner in a letter to the taxpayer that also enclosed an RAR. Like *Clay*, that letter invited

1. Our previous opinion in this case, T.C. Memo. 2021-57, cited solely to opinions published in United States Tax Court Reports. Although it was extant at the time, we did not cite to *Kroner*, which was a memorandum opinion that is not published in United States Tax Court Reports.

Mr. Kroner to seek an administrative appeal, indicating that the Commissioner had made his final determination. Like *Clay*, the Commissioner did not obtain supervisory approval before sending the letter and RAR to Mr. Kroner. And following *Clay*, we held that the Commissioner did not obtain timely approval of the penalty. The Commissioner appealed.

On appeal, the United States Court of Appeals for the Eleventh Circuit reversed as to penalties. *Kroner v. Comm'r*, 48 F.4th 1272 (11th Cir. 2022). In reversing, the Eleventh Circuit concluded "that the IRS satisfies Section 6751(b) so long as a supervisor approves an initial determination of a penalty assessment before it assesses those penalties." *Kroner*, 48 F.4th at 1276. In so holding, the Eleventh Circuit explicitly rejected *Chai*, which served as the predicate of our revisiting *Graev* and the line of cases that followed. That line of cases included *Oropeza* and *Beland* upon which we relied in previously deciding the Motion for Partial Summary Judgment in this case.

B. *Golsen*

The Eleventh Circuit's reversal of *Kroner* was consequential insofar as this case is concerned because, like *Kroner* , this case is appealable to the Eleventh Circuit. We are a court of national jurisdiction, and our cases are appealable to each of the twelve geographic circuits. I.R.C. § 7482(a), (b). In *Golsen v. Commissioner*, 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971), we wrote that

> better judicial administration requires us to follow a Court of Appeals decision which is squarely in point where appeal from our decision lies to that Court of Appeals and to that court alone.

Golsen, 54 T.C. at 757. *Golsen* requires that we follow *Kroner*, regardless of whether this Court would reach the same conclusion. This requirement helps to foster "efficient and harmonious judicial administration." *Id.* It would be a waste of judicial resources to stand by a legal conclusion that will simply be reversed on appeal. *Golsen* requires that we follow the precedent of the Eleventh Circuit where it has a decision squarely on point. On the question of when a supervisor must approve the initial determination of a penalty, *Kroner* is squarely on point. And under that precedent, the Eleventh Circuit would hold that the penalty was timely approved in this case.

C. The Battats' Alternative Arguments

Having determined that supervisory approval was timely under Eleventh Circuit precedent, we turn to the alternative arguments posed in the Battats' Motion for Partial Summary Judgment. Those two arguments were that the supervisory approval was ineffective (1) because it was done by an acting supervisor, and (2) because the approval did not undergo any meaningful review. When we previously granted the Battats' Motion for Partial Summary Judgment, we did not need to reach those issues. Having determined that we cannot grant summary judgment as to their primary argument (that

the supervisory approval was untimely) we now address those arguments.[2]

Existing precedent requires that we reject both of the Battats' alternative arguments. In *Belair Woods*, we explicitly rejected reading a "meaningful review" standard into section 6751(b). As we wrote there, "We have held in numerous cases that the group manager's signature on the Civil Penalty Approval Form is sufficient to satisfy the statutory requirements." *Belair Woods*, 154 T.C. at 17. We also noted in *Belair Woods* that staff members, including supervisors who approve penalty determinations, might change jobs, be reassigned, or retire. *Id.* And in *Thompson v. Comm'r*, 155 T.C. 87 (2020), we found that someone acting as a supervisor may approve a penalty determination. *Thompson*, 155 T.C. at 93-94.

Conclusion

In 2021, we decided as a matter of law that the Commissioner did not obtain timely supervisory approval of the penalty he had determined in connection with the Battats' 2008 income tax deficiency. In doing so, we relied on our existing precedent holding that the issuance of an RAR asserting penalties is an initial determination requiring supervisory approval under section 6751(b). Since then, the Eleventh Circuit, the circuit to which

2. Under *Kroner*, it is unclear whether these arguments are ripe. *Kroner* stands for the proposition that penalties may be approved at any time before assessment. To the extent there is or was some defect in the approval that occurred in 2011, *Kroner* would appear to permit the Commissioner to remedy that defect at any time before assessment.

this case is appealable, decided *Kroner*, holding that a supervisor can approve the initial determination any time before those penalties are assessed. If applied to the facts of this case, *Kroner* requires that we reach a different result than we did in 2021. This change in controlling law is an unusual circumstance that justifies vacating our prior order, granting leave to file a motion for reconsideration out of time, granting reconsideration, and ultimately denying summary judgment. To give effect to the foregoing, it is

ORDERED that the Commissioner's Motion to Vacate Order Served September 24, 2021, (index 137) is granted and the Order served September 24, 2021, (index 95) is vacated. It is further

ORDERED that the Commissioner's Motion for Leave to File Out of Time Motion for Reconsideration of Findings or Opinion Pursuant to Rule 161 (index 135) is granted, and the Clerk shall file the Commissioner's lodged Motion (index 136) as of June 27, 2023. It is further

ORDERED that the Commissioner's Motion for Reconsideration of Findings or Opinion Pursuant to Rule 161 filed as of June 27, 2023, is granted. It is further

ORDERED that the Battats' Motion for Partial Summary Judgment filed May 8, 2019, (index 74) is denied. It is further

ORDERED that the Battats' Motion for Oral Argument filed June 23, 2020, is denied as moot.

(Signed) Ronald L. Buch
Judge

APPENDIX D — ORDER OF THE UNITED STATES TAX COURT, FILED SEPTEMBER 24, 2021

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Docket No. 17784-12

STANLEY BATTAT & ZMIRA BATTAT,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER

Pursuant to the Opinion of the Court (T.C. Memo. 2021-57), filed May 11, 2021, it is ORDERED that petitioners' motion for partial summary judgment, filed May 8, 2019, is granted.

(Signed) John O. Colvin
Judge

APPENDIX E — MEMORANDUM OPINION OF THE UNITED STATES TAX COURT, FILED MAY 11, 2021

UNITED STATES TAX COURT

Docket No. 17784-12

STANLEY BATTAT AND ZMIRA BATTAT,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

May 11, 2021, Filed

MEMORANDUM OPINION

COLVIN, *Judge*: This case is before the Court on petitioners' motion for partial summary judgment. The issue for decision is whether the Form 4549, Income Tax Examination Changes, also known as a revenue agent report (RAR),[1] sent with a Letter 4121, Agreed

1. The Internal Revenue Service (IRS) uses Forms 4549 and 4549-A, Income Tax Examination Changes (Unagreed and Excepted Agreed), to state what it has concluded is the amount of a taxpayer's income tax liability. *See Deutsch v. Commissioner*, T.C. Memo. 2006-27, 2006 WL 345848, at *5, *aff'd*, 478 F.3d 450 (2d Cir. 2007); Internal Revenue Manual pt. 4.10.8.11.1 (June 10, 2005). Form 4549-A is also known as an examination report. *See, e.g., Clay v. Commissioner*, 152 T.C. 223, 232 (2019), *aff'd*, 990 F.3d 1296 (11th Cir. 2021); *Bourekis v. Commissioner*, 110 T.C. 20, 22 (1998); *Goldberg*

Examination Report Transmittal, was the "initial determination" by an "individual" to impose a penalty for purposes of section 6751(b).[2] For the reasons stated below we conclude that the Form 4549 sent with the Letter 4121 was the initial determination, and we will grant petitioners' motion.

Background

The audit in this case commenced on May 19, 2011. On November 28, 2011, an IRS examining agent (EA) sent petitioners an RAR attached to a Letter 4121 regarding petitioners' 2008 taxable year. The EA's name appears in the signature box provided for the IRS agent who prepared the RAR. The RAR states the amount of petitioners' "corrected" tax due and that petitioners are liable for a section 6662 penalty of $ 345,143 for 2008. The RAR also includes a signature box that, if signed by petitioners, provides their "consent to the immediate assessment and collection of any increase in tax and penalties * * * shown" on the RAR.

Enclosed with the RAR was a copy of Publication 3498, The Examination Process, which states:

> If you do not agree with the proposed changes, the examiner will explain your appeals

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v. Commissioner, T.C. Memo. 2020-38, at *138; *see also Branerton Corp. v. Commissioner*, 64 T.C. 191, 194-195 (1975).

2. Section references are to the Internal Revenue Code, Title 26 U.S.C., in effect for all relevant times, and Rule references are to the Tax Court Rules of Practice and Procedure.

> rights. * * * [Y]ou may request an immediate meeting with the examiner's supervisor to explain your situation.* * *
>
> If you cannot reach an agreement with the supervisor at this meeting, * * * the examiner will prepare a report explaining your position and ours. The examiner will forward your case to the Area office for processing.
>
> You will receive:
>
> - A letter (known as a 30-day letter) notifying you of your rights to appeal the proposed changes within 30 days * * *

In this case the EA's immediate supervisor did not sign or otherwise approve in writing the Letter 4121, the RAR, or the penalty liability stated therein.

On December 8, 2011, the EA issued a Form 4549-A attached to a Letter 950, 30-day letter, for the 2008 tax year. Also on that day the EA received written supervisory approval for the section 6662 penalty from her acting supervisor.

Discussion

A. Summary Judgment

Summary judgment is designed to expedite litigation and avoid unnecessary and expensive trials. *Fla. Peach*

Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Summary judgment may be granted with respect to all or part of the legal issues presented if "there is no genuine dispute as to any material fact and * * * a decision may be rendered as a matter of law." Rule 121(a) and (b); *see Sundstrand Corp. v. Commissioner*, 98 T.C. 518, 520 (1992), *aff'd*, 17 F.3d 965 (7th Cir. 1994). Petitioners, as the party moving for partial summary judgment, bear the burden of showing that there is no genuine dispute as to any material fact, and all factual inferences will be drawn in a manner most favorable to respondent. *See Sundstrand Corp v. Commissioner*, 98 T.C. at 520. The facts needed to decide petitioners' motion are not in dispute.

Section 6751(b)(1) provides that "[n]o penalty * * * 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". Petitioners are entitled to partial summary judgment if the initial determination was included in the RAR because supervisory approval was not provided before the RAR was issued.

B. Initial Determination Included in the RAR

The EA sent the RAR bearing her electronic signature to petitioners on November 28, 2011, attached to the Letter 4121. The RAR states that it shows the corrected amount of petitioners' tax liability and section 6662 penalty. The attached Publication 3498 states that petitioners could appeal the RAR if they did not agree with the amount of tax and penalty liability stated therein.

Appendix E

Section 6751(b)(1) requires approval for the "initial determination" of a penalty assessment. A signed, completed RAR sent with a Letter 4121 includes an "initial determination" for purposes of section 6751(b)(1). *See Beland v. Commissioner*, 156 T.C. ___, ___, 2021 U.S. Tax Ct. LEXI 8, at *5 (Mar. 1, 2021); *see also Oropeza v. Commissioner*, 155 T.C. ___, ___, 155 T.C. 132, 2020 U.S. Tax Ct. LEXIS 26 at *7) (Oct. 13, 2020).

"[The] term ['determination'] has an established meaning in the tax context and denotes a communication with a high degree of concreteness and formality", *Belair Woods, LLC v. Commissioner*, 154 T.C. 1, 15 (2020), and denotes a "consequential moment" of IRS action, *Chai v. Commissioner*, 851 F.3d 190, 220-221 (2d Cir. 2017), *aff'g in part, rev'g in part* T.C. Memo. 2015-42. The RAR states that it shows the "corrected" amount of petitioners' tax and penalty liability. The RAR also includes a signature box for petitioners to consent to the assessment of those tax and penalty amounts.

Providing the opportunity to consent to assessment of tax and penalty is a "consequential moment" to a taxpayer and the Commissioner. *See Beland v. Commissioner*, 156 T.C. at , 2021 U.S. Tax Ct. LEXI 8 at *6 ; *Belair Woods v. Commissioner*, 154 T.C. at 15. A signed, completed RAR sent with a Letter 4121 provides the requisite definiteness and formality to constitute an "initial determination" for purposes of section 6751(b)(1). *See Beland v. Commissioner*, 156 T.C. at , 2021 U.S. Tax Ct. LEXI 8 at *5; *Oropeza v. Commissioner*, 155 T.C. at , 2020 U.S. Tax Ct. LEXIS 26 at *7). The RAR includes the EA's initial determination and, because no supervisor approval was provided before the RAR was issued to petitioners, the penalty did not meet the requirements of section 6751(b).

Appendix E

To reflect the foregoing,

An appropriate order granting petitioners' motion will be issued.