In general, section 6751 requires that a supervisor give written approval before penalties can be asserted against a taxpayer. In *Koh v. Commissioner*, T.C. Memo. 2020-77, authored by the US Tax Court’s (Tax Court) most recent addition—Judge Travis Greaves—the Tax Court affirmed that an attorney from Internal Revenue Service (IRS) Chief Counsel may be authorized to assert such penalties in an answer to a Tax Court petition.

In *Koh*, the IRS sent the taxpayer a notice of deficiency that included a determination related to penalties under section 6662(j). The taxpayer filed a petition with the Tax Court contesting the IRS’s determination. In its answer, the IRS Chief Counsel attorney asserted that the taxpayer was liable for accuracy-related penalties under section 6662(b)(1) or (2), in the alternative to the section 6662(j) penalties assessed in the original deficiency notice.

The taxpayer sought partial judgment on the pleadings on the grounds that IRS Chief Counsel attorneys are not authorized to assert penalties in the answer. Under section 6751(b)(1), a penalty may not be assessed unless the “the initial determination of such assessment” was “personally approved (in writing) by the immediate supervisor of the individual making such determination.”
The Tax Court reasoned that as the IRS’s representative, the Chief Counsel attorney (or a delegate) may assert additional penalties in an answer to a Tax Court petition. Moreover, the Tax Court ruled that Chief Counsel attorneys had authority to assert penalties in an answer in *Roth v. Commissioner*, T.C. Memo. 2017-248, aff’d, 922 F.3d 1126 (10th Cir. 2019). That opinion was based on numerous cases holding that the IRS may assert penalties in an answer. However, *Roth* pre-dated the Tax Court’s opinion in *Clay v. Commissioner*, 152 T.C. 223 (2019), which cited US Court of Appeals for the Second Circuit authority for the proposition that “written approval is required no later than the issuance of the notice of deficiency rather than the assessment of the tax.”

**Practice Point:** Taxpayers continue to face risk from penalties being asserted for the first time in an answer in a Tax Court Proceeding. We believe that there is a strong likelihood that Koh will be appealed to the US Court of Appeals for the Third Circuit.

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