

# TaxNewsFlash

## United States



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## Ninth Circuit: Prior supervisory approval for penalty assessment for listed transaction; Tax Court reversed

The U.S. Court of Appeals for the Ninth Circuit today reversed the Tax Court's grant of summary judgment to a taxpayer, in a case involving when an IRS supervisor must provide the written approval required by section 6751(b) before the IRS can assess certain penalties.

The case is: *Laidlaw's Harley Davidson Sales, Inc. v. Commissioner*, No. 20-73420 (9<sup>th</sup> Cir. March 25, 2022). Read the Ninth Circuit's [decision](#) [PDF 225 KB] that includes a dissenting opinion.

### Summary

In 1999, the taxpayer became a participating employer in a purported welfare benefit plan that the IRS later determined was the same as, or substantially similar to, the tax avoidance transactions designated as "listed transactions" in Notice 2007-83. Accordingly, a taxpayer participating in the plan would be subject to a penalty under section 6707A if it did not disclose its participation on its tax return.

The taxpayer initially did not disclose its participation in the plan, but later acknowledged that the plan was a listed transaction. An IRS Revenue Agent (RA) made the initial determination to assert a penalty for failure to disclose and notified the taxpayer by issuing a "30-day letter." The 30-day letter stated that if the taxpayer took no action by the 30-day response date, penalties would be assessed. However, no IRS supervisor had yet provided the written approval for the penalty as required by section 6751(b). The RA's immediate supervisor provided the written approval after the 30-day period had expired, and after the taxpayer had submitted a letter protesting the proposed penalty.

The taxpayer's administrative appeal was unsuccessful, and the IRS assessed the penalty. After a collection-due-process (CDP) hearing, the taxpayer filed a petition in the Tax Court challenging the Appeals Office's notice of determination from the CDP hearing. Following a remand for the Appeals Office to consider certain issues not raised in this appeal, and a supplemental notice of determination, the Tax Court agreed that the IRS had not complied with the written supervisory requirement in section 6751(b), and granted summary judgment in favor of taxpayer.

The Ninth Circuit today noted that section 6751(b) requires written supervisory approval before assessment of the penalty or, if earlier, before the relevant supervisor loses discretion whether to

approve the penalty assessment. The appellate court found that in this case, the supervisor gave written approval of the initial penalty determination before the penalty was assessed and while she still had discretion to withhold approval, and consequently reversed the Tax Court's grant of the taxpayer's motion for summary judgment

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