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Amendment to Ohio CAT R&D Tax Credit Statute Causing Problems for Taxpayers

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In last year's Ohio budget bill (Am. Sub. HB 33), the Ohio General Assembly amended the Ohio Commercial Activity Tax (CAT) Research and Development Investment (R&D) Tax Credit statute (R.C. 5751.51), and in so doing effectively gave justification to the Ohio Department of Taxation's aggressive audit policy. While the amendments are innocuous (i.e., record retention and audit sampling) the department can now cite these amendments as support for their aggressive audit policy. The Ohio credit should not be hard for taxpayers to calculate. That was the General Assembly's intention anyway when they enacted the credit in 2005. Taxpayers start with their "qualified research expenses" as determined by Internal Revenue Code section 41. They then identify the "Ohio" portion of those expenses and then undertake a simple math exercise to determine their Ohio credit. Effectively, the Ohio R&D credit piggybacks off the federal R&D credit. Designing the Ohio credit this way should limit the department's auditing to determining whether the taxpayer's expenses were in Ohio or not. However, that is not happening. The department instead undertakes the job of the Internal Revenue Service to determine whether the taxpayer's expenses fall within IRC section 41. The wisdom of the department's approach is questionable as is the department's corresponding expertise. What is not questionable is that the department's approach is creating problems for taxpayers. Additionally, the department imposes unrealistic evidentiary burdens on taxpayers that to-date many taxpayers have failed to overcome. This is self-evident by the number of final determinations issued by the tax commissioner in the last year ruling against the taxpayer even though the taxpayer claimed the federal R&D credit without objection by the IRS. Taxpayers would be well served to engage outside counsel early in the audit process, and certainly should do so in connection with appealing an assessment or denied refund claim. As things stand now, the Ohio General Assembly gave taxpayers a tax benefit in 2005, and the Department is effectively relying on amendments in 2023 to justify taking that benefit away under the pretext of "sound" audit policy.