

Morgan Lewis **150**
YEARS

**NINTH ANNUAL
RESEARCH &
DEVELOPMENT
TAX CREDIT
SYMPOSIUM**

November 16, 2023 - Chicago

Welcome Remarks

Presenters: Alex Sadler & Doug Norton, Morgan Lewis

9th Annual R&D Tax Credit Symposium



Morgan Lewis

Our Objectives



Premier knowledge-sharing event



An opportunity for R&D practitioners to network

What's New?

- Section 174 no longer permissive, R&E expenditures must be capitalized
- IRS hyper-focused on qualification and substantiation at the business component level
- New cases on pilot models, substantiation, process of experimentation, and other issues
- Much more to be covered today



Internal Revenue Service

- Current leadership very focused on “compliance” and pre-screening bad claims from the system
- Firmly believe that the statute requires that the qualification requirements be applied at the level of each individual business component level
- Receiving additional resources to staff cases



The 2023 Symposium: Back To In-Person

255

Total # of registrants for DC & Chicago

(SOLD OUT in both locations!)

21

Total # of companies represented

56

Total # of providers represented

2023 ML R&D Tax Credit Symposium

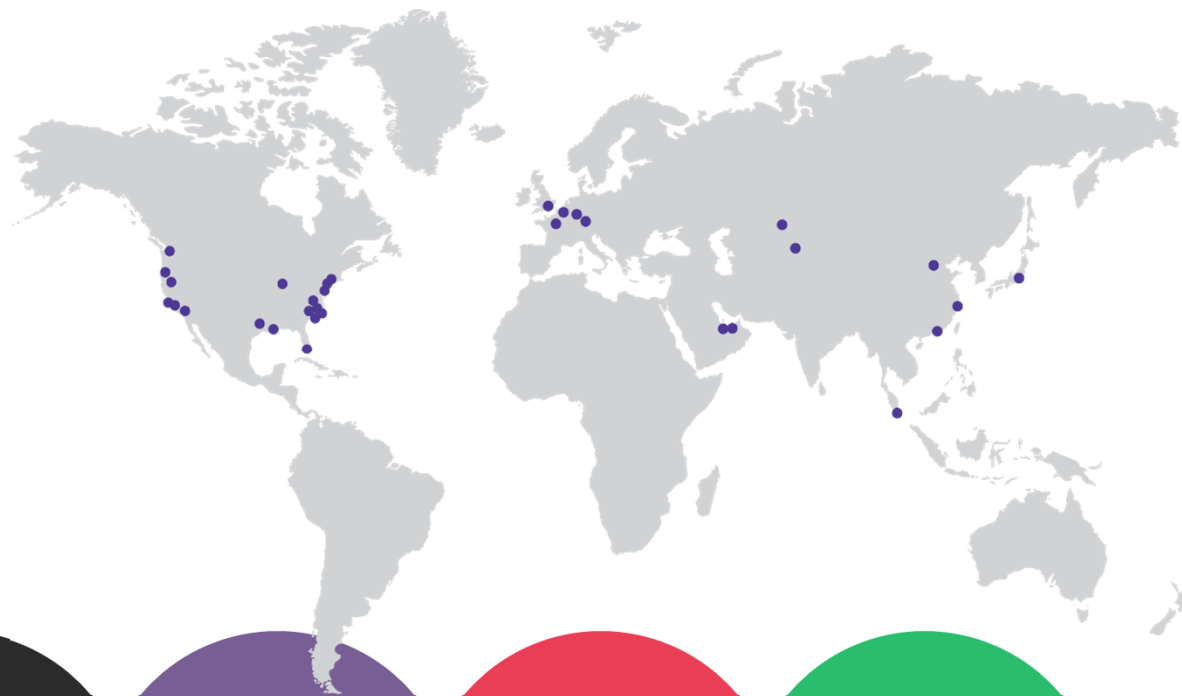
Companies Represented (DC & Chicago)

- Amazon
- BlueRock Therapeutics
- Capital One
- Commscope
- Dow
- Expedia Group
- FanDuel
- Google
- HII
- KLA Corporation
- Leidos
- Lockheed Martin
- Midmark Corporation
- Oshkosh Corporation
- Smithfield Foods
- Steel Dynamics
- The Boeing Company
- The Sherwin-Williams Company
- The Vanguard Group
- United Launch Alliance
- Walgreen Co.

2023 ML R&D Tax Credit Symposium Providers Represented (DC & Chicago)

- ABGI-USA
- Alvarez & Marsal
- Anchin, Block & Anchin
- Anglin Reichmann Armstrong
- Aprio
- Asher & Associates
- Bernard Robinson & Company
- BPM
- Calvetti Ferguson
- Capstan Tax Strategies
- Carrazco
- CFO Services
- Cherry Bekaert
- CLA
- CohnReznick
- Crowe
- Deloitte
- DST Advisory Group
- Earnd
- EEPB InnoTax
- Eide Bailly
- EY
- Forvis
- Frazier & Deeter
- Grant Thornton
- Global Tax Management
- ICS Tax
- Intuitive Tax Consulting
- Kaufman Rossin
- Kipsi
- KLR
- Koch Siedhoff Hand & Dunn
- Kochi Ventures
- KPT Consulting
- Leaf Specialty Tax Consultants
- Lumsden & McCormick
- Massie R&D Tax Credits
- McGill, Power, Bell & Associates
- McGuire Sponsel
- Miller Cooper
- Moss Adams
- Plante Moran
- PwC
- R&D Tax Savers
- Rehmann
- Rodl & Partner
- Royse Partners Unlimited
- Ryan LLC
- Schneider Downs
- Sensiba
- Smith + Howard
- Source Advisors
- Sycamore Growth Group
- Tanner
- Warner Robinson
- Wipfli

Our Global Footprint



30+ OFFICES
ACROSS 17
TIME ZONES



15 Areas of Service

Antitrust & Competition

Corporate & Business
Transactions

eData

Employee Benefits/Executive
Compensation

Energy

FDA & Healthcare

Finance

Intellectual Property

Investment Management

Labor & Employment

Litigation

Private Client

Structured Transactions

Tax

Telecommunications,
Media & Technology

13 Sectors

Highly focused
collaboration



**Aerospace &
Defense**



Energy



Life Sciences



**Automotive &
Mobility**



Fintech



**Retail &
Ecommerce**



Banking



Healthcare



Sports



Education



Insurance



Technology



**Investment
Funds**

MORGAN LEWIS TAX

**BREADTH OF OUR
PRACTICE**



SELECT TAX ACCOLADES

**Tier 1,
Tax Litigation**

US News & World
Report/Best Lawyers
(2018-2022)

Tier 1, Tax Law

US News & World
Report/Best Lawyers
(2018-2022)

**Band 1,
Tax (DC)**

Chambers USA
(2017-2023)

**US Transfer
Pricing Firm of
the Year &
North America
Transfer Pricing
Firm of the Year**

International Tax Review
(2021)

**Band 1,
Tax Controversy
(Nationwide)**

Chambers USA
(2017-2022)

**Tier 1,
Tax Controversy
(US)**

Chambers USA
(2017-2022)

**Tier 1, Nonprofit
and Tax-Exempt
Organizations**

Legal 500 US
(2017-2023)

Our R&D Tax Credit Practice

- Consultation (advisory firms and companies)
 - Proactive risk mitigation (e.g., contract revisions, study practices, etc.)
 - Analysis of credit positions
 - Technical questions
 - Reserve analysis
 - Review of study materials, position memos, and draft IDR & NOPA responses
 - Training
- Dispute resolution (companies)
 - Audit strategy and support
 - Appeals – case development and presentation for settlement
 - Litigation
- Industries served include aerospace, automotive, agriculture, heavy manufacturing, pharma, medical device, chemicals, oil and gas, other energy, construction, engineering, retail, transportation, and advisory

Today's Program – Morning

8:00 am – 8:30 am	Breakfast and Registration
8:30 am – 9:00 am	Welcome Remarks Morgan Lewis: Alex Sadler and Doug Norton
9:00 am – 10:00 am	Hot Topics & Technical Developments EY: Alexa Claybon
10:00 am – 11:00 am	Highs & Lows from Recent R&D Cases – Little Sandy, Betz, Moore, and More Morgan Lewis: Alex Sadler, Doug Norton, and Michelle Andrighetto
11:00 am – 11:15 am	BREAK
11:15 am – 12:15 pm	State of Play with New Section 174 – Interim Guidance, Remaining Quandaries, and Practical Approaches Alvarez & Marsal: Kathleen King Forvis: Mike Boenzi Plante Moran: Nick Thomsen
12:15 pm – 12:30 pm	ATTENDEES VISIT BUFFET / RETURN TO TABLES FOR LUNCHTIME KEYNOTE
12:30 pm – 1:30 pm	LUNCH KEYNOTE What is Happening at the Internal Revenue Service? New Funding, Staffing, Campaigns, and Approaches to Taxpayer Compliance Morgan Lewis: Jennifer Breen

Morgan Lewis

Today's Program – Afternoon

1:30 pm – 2:30 pm	The Research Credit Refund Claim Directive 2 Years Later – Practitioner Experiences and Strategies for Successfully Navigating the New World Order ABGI-USA: ABGI-USA: Matt Hunt Cherry Bekaert: Daniel Mennel Crowe: AJ Schiavone MASSIE R&D Tax Credits: Catie Ely Moss Adams: Star Fischer
2:30 pm – 3:30 pm	Taxpayer and Practitioner Takeaways and Insights from the Latest R&D Roundtables with LB&I Executives Capital One: Brian Kaufman Crowe: Shelby Ford EY: Alexa Claybon
3:30 pm – 3:45 pm	BREAK
3:45 pm – 4:45 pm	Defending Your R&D Positions in IRS Examinations and Administrative Appeals – Latest Learnings and Approaches Morgan Lewis: Tom Linguanti PwC: John Stell, Peter Todd, and Tricia Schweska
4:45 pm – 5:45 pm	Faculty Q&A Faculty members respond to attendee questions; link to submit questions available via app
5:45 pm	Book Raffle & Cocktails

Morgan Lewis

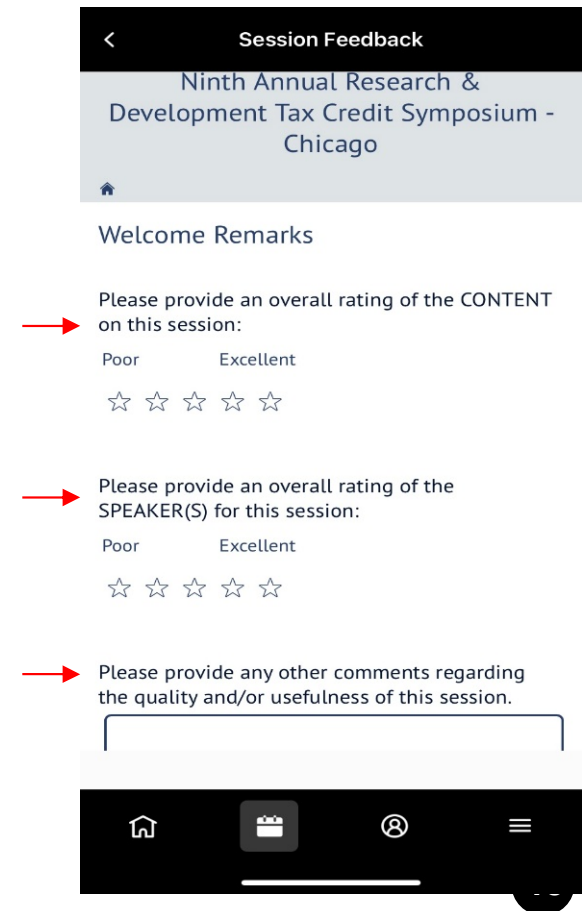
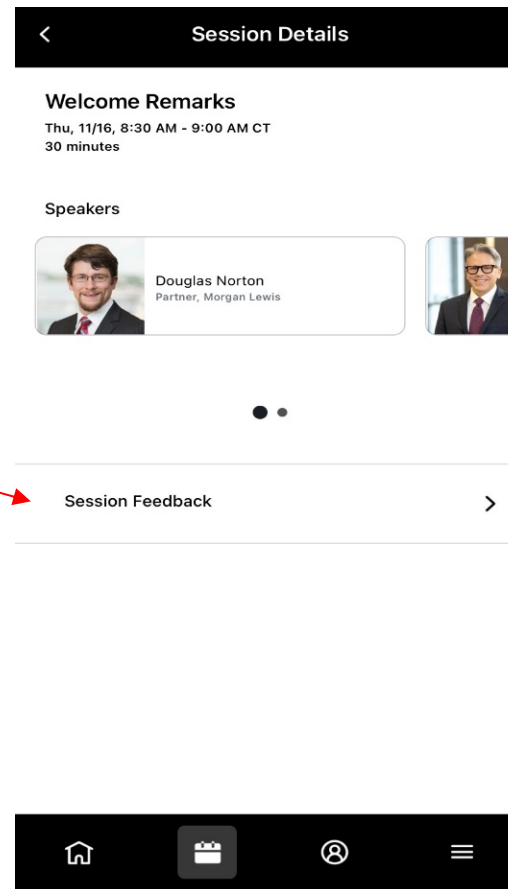
Your Feedback – Session Surveys

We'd love to hear from you!

Following each session, please take a minute to answer our very brief three-question "session survey" to tell us how we're doing and how we can improve as we plan for next year.

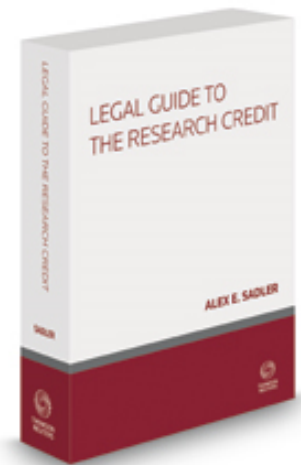
- Click on **"Schedule"** at the top of the app homepage
- Click on **any session** from the calendar
- Click on **"Session Feedback"**
- Answer three questions, (two questions ask for ratings of 1-5 stars, one is an open-ended comment)

Morgan Lewis



Raffle Time...

- Attendees who completed the in-app quiz yesterday evening and answered the most questions correctly have been entered into a raffle to win one of four R&D treatises!



Morgan Lewis

Special Thank You



Morgan Lewis

Faculty



Morgan Lewis



ML Planning Team

- Corey Ellen Sharkey
- Sabrina Tredwell
- Stacey Hudson



Morgan Lewis

Last, But Not Least



Morgan Lewis

Morgan Lewis **150**
YEARS

**NINTH ANNUAL
RESEARCH &
DEVELOPMENT
TAX CREDIT
SYMPOSIUM**

November 16, 2023: Chicago

Hot Topics & Technical Developments

Presenter: Alexa Claybon, EY

Presenter



Alexa Claybon

**EY, National Tax
Department**

Today's agenda

- **Recent administrative guidance**
- **Recent cases**
 - **Little Sandy Coal; Moore; Betz; United Therapeutics; Phoenix Design Group**
 - **Case updates**
- **State R&D**



Recent administrative guidance

Form 6765 “preview of proposed changes”

- Published September 15th, 2023
- New sections E and F
- IRS press release: “These potential changes will help the IRS accomplish some objectives of the IRS Inflation Reduction Act Strategic Operating Plan. For example, helping taxpayers meet their obligations and using enhanced data and analytics to operate more efficiently and select the highest risk cases. Each year, the IRS receives thousands of returns from corporations, businesses and individual taxpayers claiming the Research Credit. Research Credit issues are currently examined in a substantial number of cases and consume significant resources for both taxpayers and the IRS. To provide effective tax administration for this issue, the IRS must ensure taxpayers understand what is required to support claiming the Research Credit.”
- Feedback requested by October 31, 2023

Notice 2023-63 – interim guidance under §174

Section	Topics in Notice 2023-63
Section 1	Overview
Section 2	Background
Section 3	Capitalization and Amortization of SRE Expenditures
Section 4	Scope of Section 174
Section 5	Software Development
Section 6	Research Performed Under Contract
Section 7	Disposition, Retirement, or Abandonment of Property
Section 8	Long-Term Contracts Under Section 460
Section 9	Cost Sharing Regulations at Treas. Reg. Section 1.482-7
Section 10	Applicability Rules
Section 11	Request for Comments
Section 12	Effect on Other Documents

Revenue Ruling 2023-8

- The IRS revoked a long-standing revenue ruling on correcting missed deductions for research or experimental expenses, effective July 31, 2023
- Taxpayers can't rely on Rev. Rul. 58-74 as authority for correcting missed research or experimental expenses deductions on an amended return
- Because the IRS is likely to challenge amended returns correcting missed deductions for research or experimental expenditures, taxpayers should be prepared to (1) demonstrate they had a method of accounting of deducting research or experimental expenditures in the tax year being amended, and (2) explain why they failed to deduct all research or experimental expenditures in the tax year being amended
- Taxpayers will have to rely on other authorities

Field Advice Memorandum 20214101F developments

- The administration of the guidance concerning section 41 refund claims continues to frustrate taxpayers and practitioners as it is inconsistent and opaque
 - Taxpayers continue to receive 45-day letters for amended returns that do not ask for a refund and claim rejections prior to the expiration of the 45-day period
 - Taxpayers are unable to contact IRS personnel for clarification
 - IRS unable to provide data related to the administrative process
- The IRS has extended the transition period (period during which taxpayers will receive a letter requesting compliance within 45 days) to expire on January 10, 2025
- Updated FAQs provide a suggested format that contains information that is not currently requested in FAA20214101F

Technical Advice Memorandum 202327015

- At IRS Appeals, the taxpayer requested a TAM after exam had disallowed the taxpayer's research credit claims on the basis that any research activities were undertaken for purposes of style, taste, cosmetic or seasonal design factors, and Appeals tentatively agreed with exam
- Associate Chief Counsel's Office concluded that the "mere fact that" some of a retail apparel company's activities were not conducted for a permitted purpose under IRC Section 41(d)(3) did not preclude the Taxpayer from satisfying the process of experimentation test under IRC Section 41(d)(1)(C) for its activities in the development of a business component
- The TAM also stated that the company's activities were "possibly" conducted for a permitted purpose

Section 280C elections

- TCJA amendment to Section 280C(c) removed portion of rule that requires taxpayers to reduce their current year deductible QREs by the credit amount, but retained the provision that requires taxpayers to reduce the capitalized amount of QREs by the excess of the credit over the current year deduction
- Resulting questions:
 - What did Congress intend, and does it matter?
 - *cf* QIP (Congress leaving out QIP from bonus depreciation, requiring a legislative fix)
 - Does Section 280C(c) apply if the credit amount does not exceed the deductible amount of QREs?
 - Why would a taxpayer make a reduced credit election if they are not required to reduce the deductible or capitalizable QREs?

Recent cases

Little Sandy Coal, Inc. v. Commissioner **62 F.4th 287 (7th Cir. 2023)**

- The 7th Circuit affirmed the Tax Court's finding that the taxpayer did not provide sufficient substantiation that the activities conducted by both the production and non-production employees were elements of a POE.
- The 7th Circuit disagreed with the Tax Court's categorical exclusion of direct support and direct supervision activities, including production employees' activities, from the POE "substantially all" test.
- The Appeals Court provided the following formula for evaluating whether a taxpayer has satisfied the "substantially all" test:

Research activities that constitute elements of a POE

*Research activities not excluded under section 41(d)(4) and
whose expenses are deductible under section 174*

Little Sandy Coal, Inc. v. Commissioner
62 F.4th 287 (7th Cir. 2023)

- “The lesson for taxpayers seeking to avail themselves of the research tax credit is to adequately document that substantially all of such activities were research activities that constitute elements of a process of experimentation. Generalized descriptions of uncertainty, assertions of novelty, and arbitrary estimates of time performing experimentation are not enough.”
- “Other taxpayers seeking to avail themselves of the research tax credit would be well-advised to document research activities for subcomponents if they cannot demonstrate a process of experimentation at the business component level.”

Little Sandy Coal, Inc. v. Commissioner **62 F.4th 287 (7th Cir. 2023)**

- The 7th Circuit's decision provides guideposts for taxpayers to sustain their credit claims:
 - Provide evidence that quantifies the amount and identifies the type of activities conducted on individual business components or sub-components
 - Provide evidence relating to the intent of a pilot model and how it is used in the POE
 - Provide evidence that demonstrates that the taxpayer's research was conducted using a scientific method (formation of a hypothesis, testing the hypothesis, refining the hypothesis)

***Moore v. Commissioner*, T.C. Memo. 2023-20**

- Tax Court denied the inclusion of the wages of the taxpayer's COO in computing the taxpayer's research credit.
- The Tax Court's discussion of the research projects and the COO's activity demonstrates that the taxpayer was performing qualified research and that some portion of the COO's activities were research activities. For one project, the COO was even named on a product patent.
- Even though he was extensively involved in new product development, the record did not show the portion of the COO's work on new product development that met the requirements of "qualified research."
- As in many other recent cases, the exclusion of the COO's wages as QREs was due to the taxpayer's lack of documentary substantiation.

***Betz v. Commissioner*, T.C. Memo. 2023-84**

- Tax Court denied the taxpayers' research credit claim for activities conducted by an S corporation that designs and supplies air pollution control systems under contracts with its customers.
- Tax Court held that the taxpayers failed to carry the burden of establishing that the products were pilot models under section 174 or of establishing that the wages of the company's employees were incurred in the performance of qualified services.
 - “Merely identifying a project difficulty and the eventual design solution, without bridging the gap with evidence as to what investigative activities were performed, does not satisfy petitioners' burden.”
- Additionally, for some of the company's projects, the Tax Court found that the research was not qualified research because it was funded.
- Tax Court upheld accuracy-related penalties asserted against the taxpayers under section 6662.

United Therapeutics Corp. v. Commissioner, 160 T.C. No. 12 (2023)

- In a case of first impression, the Tax Court held that the taxpayer's research credit was overstated because the taxpayer excluded qualified clinical testing expenses (QCTEs) from its base amount in computing its research credit.
- For the credit year at issue and the base periods, taxpayer had claimed both the research credit under section 41 and the orphan drug credit under section 45C; for the credit year at issue, the taxpayer excluded QCTEs from year's QREs and the three preceding years' QREs.
- "The only question before us is whether 'base period research expenses' are relevant to United Therapeutics' research credit computation."
 - Based on statutory text, structure of the provisions, and using statutory interpretation rules, the Court found that "base period" means the three-year period preceding the credit year
- This case has been appealed to the Fourth Circuit.

Phoenix Design Group, Inc. v. Commissioner ***Docket No. 4759-22 (Aug. 29, 2023)***

- Out of a population of 238 projects, the taxpayer used a sample of 24 to determine QREs (only 20 of the sample items were qualified research projects).
- During discovery, the government asked for documentation on all 238 projects. The taxpayer filed a Motion for Protective Order asking the court to limit discovery to a subset of three to six projects selected from the qualifying sample, and the government objected.
- Because the government and taxpayer had not agreed to a representative sample of the research projects to be tried and binding on all research projects, the Tax Court was unwilling to limit discovery (finding that it improperly relieves the taxpayer of its burden of proof and that the taxpayer did not show that the three to six proposed projects were representative of the population).
- After prompting from the Tax Court, the parties subsequently agreed to limit the scope of the trial to four projects.

Cases update

Cases update

<i>Kellett v. Commissioner, T.C. Memo 2022-62</i>	<i>Perficient, Inc. v. Commissioner, Tax Court Docket 7600-18</i>	<i>Meyer, Borgman & Johnson, Inc. v. Commissioner, Tax Court Docket 7805-16</i>
<ul style="list-style-type: none">• On the taxpayer’s appeal to the 4th Circuit, IRS filed a motion to vacate the Tax Court decision, stating that the IRS “now agrees that the Appellant should be allowed to take an immediate deduction” for software development costs• Tax Court found that none of the expenses could be treated as deductible under section 174 or Rev. Proc. 2000-50	<ul style="list-style-type: none">• Parties filed cross motion for summary judgment on the issue of whether the taxpayer’s research was funded• Ultimately, the question was whether it is possible to have unfunded internal research that related to the completion of a contract that does not call for research• Settlement stipulation was entered on April 13, 2023	<ul style="list-style-type: none">• The taxpayer is appealing the Tax Court’s summary judgment orders relating to whether the taxpayer’s research was funded• On appeal to the 8th Circuit

Cases update

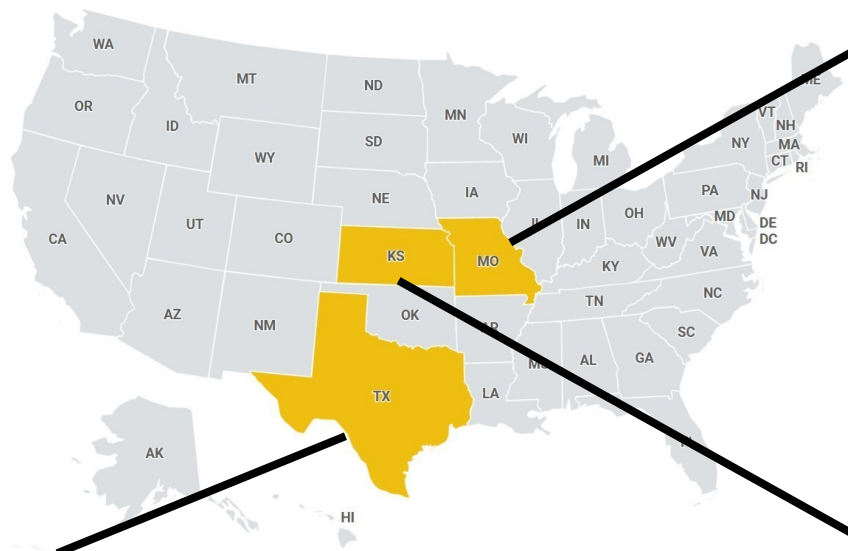
Harper v. Commissioner, T.C. Memo. 2023-57

- Tax Court summary judgment order regarding whether taxpayer satisfied the “business component” test.
- The Court found that the record contradicted the government’s assertions that the taxpayer failed the business component test (i.e., its design were not new or improve, that they were not “products,” and that the business didn’t use the “products” in its business).
- Government’s summary judgment motion denied.

United States v. Grigsby, U.S. Dist. Ct. (Louisiana)

- Summary judgement granted to the government on issues of whether research was funded and substantiation.
- Court rejected taxpayer’s attempted change of business component characterization from a “product” to a “process.”
- Court didn’t make determinations about the qualification of the taxpayer’s activities.

State R&D credit update



Texas

- Tax Policy update (re Ryan and Fiserv cases, regulatory amendments, R&D sales tax exemption, oil & gas exploration issues)
- R&D credit audit training
- Instructions on submission of an R&D credit approval memo
- Memo on amending out of statute reports to create a credit carryforward

Missouri

- ▶ For tax years beginning on or after January 1, 2023, Missouri will provide \$10m annual pool of R&D credits, which can be used against Missouri corporate income tax and financial institutions tax
- ▶ The credit may be transferred, sold, or assigned

Kansas

- ▶ The Kansas R&D credit increases from 6.5% to 10% of qualified expenditures for tax years beginning January 1, 2023
- ▶ For tax year 2023 and years thereafter, the credit allowed shall be transferrable by a taxpayer without a current tax liability



Biography



Alexa Claybon

Ernst & Young, US LLP

+1.303.906.9721

alexa.claybon@ey.com

Alexa is a Principal at EY's national tax department in Washington, D.C. and a former Attorney-Advisor for the Office of Tax Policy at the Treasury Department. She is the technical leader for EY's federal R&D credit practice and is a part of the business tax services group specializing in research credit and incentives and federal income tax accounting methods and periods. Alexa advises clients in all industries on tax technical and strategic matters and participates on behalf of clients in IRS examinations and appeals.

Alexa has an LLM from Georgetown University Law Center, a JD from Northeastern University School of Law, and a BA from the University of California, Santa Barbara.

Morgan Lewis

THANK YOU

© 2023 Morgan Lewis

Morgan, Lewis & Bockius LLP, a Pennsylvania limited liability partnership

Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Our Beijing, Shanghai, and Shenzhen and offices operate as representative offices of Morgan, Lewis & Bockius LLP.

In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Attorney Advertising.

Morgan Lewis

Morgan Lewis **150**
YEARS

**NINTH ANNUAL
RESEARCH &
DEVELOPMENT
TAX CREDIT**

SYMPOSIUM

November 16: Chicago

Highs & Lows from Recent R&D Cases – *Little Sandy, Betz, Moore, and More*

Presenters: Alex Sadler, Doug Norton, and Michelle Andrighetto

Morgan Lewis & Bockius LLP

Presenters



Alex Sadler



Doug Norton



Michelle Andrightto

Forming Storm Clouds

- Results and reasoning of recent cases mostly negative to taxpayers
- Recurring emphasis on the taxpayer's burden of proof and perceived inadequate substantiation at the business component level
- A few rays of sunlight, but you must search for them



***Little Sandy Coal Co. v.
Commissioner***

62 F.4th 287 (7th Cir. 2023)

The Final Chapter of a Trilogy



*Trinity Indus., Inc. v.
U.S.* (N.D. Tex. 2010)

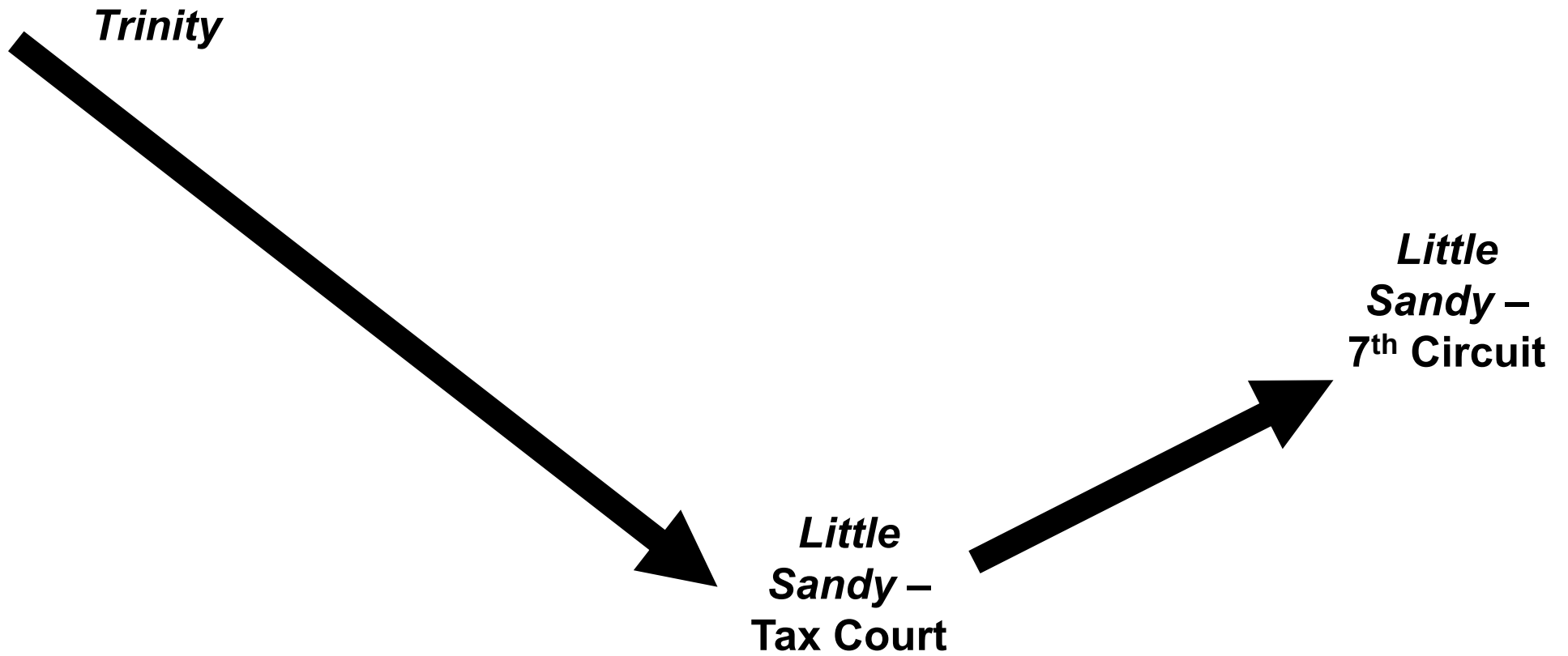


*Little Sandy Coal Co.
v. Commissioner* (U.S.
Tax Ct. 2021)



*Little Sandy Coal Co.
v. Commissioner* (7th
Cir. 2023)

How Things Ended Up



The Beginning: *Trinity Industries* (N.D. Tex. 2010)



Involved Mark V deployment craft and Dirty Oil Barge, first-in-class nautical vessels developed under contract.

Morgan Lewis

The Beginning: *Trinity Industries* (N.D. Tex. 2010)

Focus on novelty of the prototype:

“The Court conceptually agrees with Trinity. If a first in class ship is sufficiently experimental, the risk of failure attaches to the entire project. The potential loss includes not just the experimental aspects, but also the paint.”

Broad inclusion of construction costs:

“The Court finds that the additional expenses the government cites [insurance costs] are properly considered research expenditures in that the business component—the ship—could not have been developed without them. Under the 80% rule, the Court finds that those costs are properly included in QRE for the Mark V and the Dirty Oil Barge.”

The Middle Chapter: *Little Sandy Coal* (Tax Ct. 2021)



Morgan Lewis

The Middle Chapter: *Little Sandy Coal* (Tax Ct. 2021)

- “For the Tanker, Taxpayer claimed the research tax credit on \$2,505,491 of **production costs** and \$3,892,142 of **supply costs**. And for the Dry Dock, Taxpayer claimed \$146,109 of **production costs** and \$1,943,265 of **supply costs**.”



The Middle Chapter: *Little Sandy Coal* (Tax Ct. 2021)



- The District Court in *Trinity Industries* erred in not applying “the quantitative analysis section 1.41-4(a)(6), Income Tax Regs., requires.”
- The ‘substantially all’ rule of Treas. Reg. § 1.41-4(a)(6) “is satisfied only if 80 percent or more of a taxpayer’s research activities, measured on a cost or other consistently applied reasonable basis ... constitute elements of a process of experimentation for [a qualified purpose].”

The Middle Chapter: *Little Sandy Coal* (Tax Ct. 2021)

The “substantially all” fraction of Treasury Regulation section 1.41-4(a)(6)

Production worker services not includible in numerator

“Those who directly support research are, by definition, not engaged in research. Consequently, their activities cannot be viewed as elements of any process of experimentation that research might entail.”

Taxpayer’s research activities constituting elements of a POE

All the taxpayer’s research activities

>80%

Production worker services may be includible in denominator if section 174 test met

Implication for Pilot Model Research

- “Consider the practical import of the tax court’s categorical exclusion of pilot model production expenses from the numerator. Under the tax court’s reasoning, the more costly the production expenses for developing a pilot model, the less likely that a taxpayer can fulfill the “substantially all” test. Obviously, pilot model production expenses can vary widely depending on what is being modeled. For example, producing models of a plastic fork is much cheaper than making models of a fully functional automobile. **If we include such model production expenses in the “substantially all” denominator but categorically exclude them from the numerator, as the tax court suggests, the satisfaction of the test would depend on how small the pilot model production expenses are relative to the nonproduction research expenses.** It escapes reason why the “substantially all” test should depend on how expensive it is to produce the pilot model.” (65 F.4th at 305 n.3).

The Sequel: *Little Sandy* (7th Cir. 2023)



Morgan Lewis

Tightening Up the Four-Part Test

- **Section 174 Test:** Requires the taxpayer's activities be "investigative" and focuses on uncertainty concerning the "concept" of a product, as opposed to the construction of the product (e.g., whether a tire will fit, a weld will hold a truss, or whether the product will meet customer specifications)
- **Process of Experimentation Test:** **requires the use of scientific method to resolve uncertainty, an "analytical technique by which a hypothesis is formulated and then systematically tested through observation and experimentation."** (*UCC, Siemer Milling*)



Agreement & Disagreement with the Tax Court

Agreement

- Rejection of “novelty approach” that looks to the novel and innovative features of the business component to satisfy the substantially all test of Treas. Reg. § 1.41-4(a)(6)
- Application of the substantially all test at the level of the business component—each vessel
- Pilot model production expenses properly included in the denominator of the substantially all fraction

Disagreement

- Categorical exclusion of pilot model production costs from the numerator of the substantially all fraction
 - “[I]f the pilot model was used to evaluate alternatives as part of a ‘methodical plan involving a series of trials to test a hypothesis,’ the model production activities would also constitute elements of a process of experimentation. This casts doubt on the tax court’s ... approach.”
 - “If we include such model production expenses in the ‘substantially all’ denominator but categorically exclude them from the numerator, as the tax court suggests, the satisfaction of the test would depend on how small the pilot model production expenses are relative to the nonproduction research expenses.”
- Relevance of direct support and direct supervision categories

Even So, Little Sandy Failed Its Burden of Proof

- “Taxpayer asks us to take on faith that the percentage allocations of each nonproduction employee’s wages were only for research activities that involved a process of experimentation. But Section 41(d) requires us to walk by sight, not by faith. Taxpayer has the burden to document that the activities accounted for by the nonproduction wages were elements of a process of experimentation. The regulations do not require records in any particular form, except that they must be “in sufficiently usable form and detail to substantiate that the expenditures claimed are eligible for the credit.” And the “substantially all” test allows for the fraction to be measured “on a cost or other consistently applied reasonable basis.” So flexibility is built into the test. But shortcut estimates of experimentation-related activities will not suffice. **Something more, such as documentation of time spent on such activities, is necessary.**”



The Seventh Circuit's Parting Thoughts

- “The lesson for taxpayers seeking to avail themselves of the research tax credit is to adequately document that substantially all of such activities were research activities that constitute elements of a process of experimentation. Generalized descriptions of uncertainty, assertions of novelty, and arbitrary estimates of time performing experimentation are not enough.”



Hidden Gems

- “More importantly, the numerator—a subset of the denominator—also requires that the research activities ‘constitute *elements* of a process of experimentation.’ Thus, the numerator is broad enough to encompass research activities that are not per se experimentation or testing.” 62 F.4th at 300.





Moore v. Commissioner,
T.C. Memo. 2023-20

Overview of *Moore*

- Ms. Moore was the sole owner and CEO of Nevco, an S corporation that manufactured scoreboards and LED displays for sporting events.
- Nevco claimed research credits that flowed into Ms. and Mr. Moore's joint returns.
- Nevco took the position that 65% of compensation amounts paid to its President/COO were QREs for research credit purposes.
- Nevco did not maintain a record of the activities performed or the time spent by its President/COO engaging in qualified research.
- The Tax Court acknowledged that:
 - Nevco conducted product development projects; and
 - the President/COO spent 50–65% of his time on product development activities (design, programming, testing & securing a patent), some—but not all—of which constituted qualified research.
- However, the Tax Court **rejected the QREs in their entirety** because "[t]he record provides no estimates of the amount of time [the President/COO] spent on qualified research as distinguished from the broader category of new product development."



Key Observations

The Tax Court appears to have erred in applying the four-part test at the level of the President/COO's individual activities rather than to the business component (e.g., scoreboard truss, LED display, etc.) being developed by Nevco.

Research credit claimants have the burden of proof to substantiate QREs. Courts are hesitant to use or adopt estimates without a strong basis in the evidentiary record.



U.S. v. Grigsby,
635 F. Supp. 3d 467
(M.D. La. 2022)

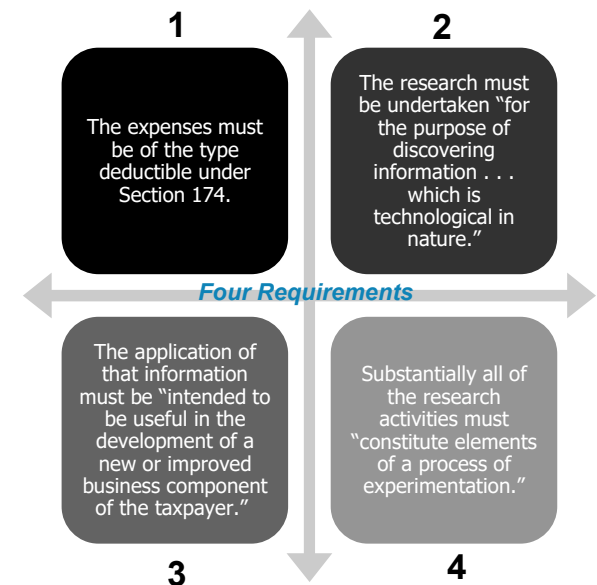
Overview of *Grigsby*

- Taxpayers were shareholders of Cajun, an S corporation. Cajun was a civil construction company that contracted with private and public clients to provide a wide-range of construction services in various markets—e.g., oil and gas, chemical processing, power and utilities, infrastructure, communications, and water quality.
- Cajun hired AlliantGroup (“**AG**”) to perform a research credit study. Based on a sampling of 105 projects, AG determined that Cajun was entitled to claim additional research credits exceeding \$1.3 million. Thereafter, Cajun amended its tax return and associated Forms K-1. Upon receiving their amended Form K-1, the taxpayers filed an amended return and claimed a refund.
- The IRS disputed the refund. The Middle District of Louisiana granted summary judgment in the government’s favor. The District Court found that:
 - (1) Cajun did not perform qualified research, and
 - (2) even if it did, the research fell within the funded research exception and the taxpayers were therefore not entitled to a refund.

Overview of *Grigsby*

- The taxpayers didn't offer competent evidence that Cajun performed "qualified research." In particular, the taxpayers failed to show that the information sought was intended to be useful in the development of a new or improved business component of the taxpayer" (requirement 3).
- The taxpayer argued that summary judgment was inappropriate because a dispute existed regarding the "business component" requirement. It argued that for each of the sample projects,* Cajun "develop[ed] construction processes which Cajun used to construct items for its clients."

Section 41 "Qualified Research"



* The parties that a sampling of four of Cajun's projects would be determinative of the outcome of this dispute.

Overview of *Grigsby*

For the following three reasons, the Court was not persuaded by the taxpayers' argument:

- The taxpayers' assertion that it developed new processes "flies in the face" of their earlier response to an interrogatory in which they unequivocally stated that—as to each sample project—Cajun developed a product.
- The taxpayers' assertions lacked specificity:

“Defendants vaguely reference new ‘construction processes’ throughout their opposition memorandum, yet fail to specifically identify even one new or improved process that resulted from Cajun’s work on the Representative Projects. Instead, as to each Project, Defendants equate new or improved ‘processes’ with Cajun’s ‘methods of construction,’ stating without elaboration that ‘Cajun performed engineering analyses that fundamentally relied on engineering principles, which allowed Cajun to determine the proper method of construction.’ . . . As a result, the Court is left to guess what ‘construction processes’ (if any) Defendants contend are new or improved.”
- Lastly, the Court concluded that Cajun’s alleged research was “funded” and thus not credit eligible; contracts underlying the projects plainly dictated that Cajun relinquished its right to any research *and/or* was paid for its research and didn’t incur financial risk.

Key Observations

It's not enough for a taxpayer to simply assert the existence of a new or improved business component; it must describe that business component and explain how the research activity at issue relates to its development.

When a taxpayer pursues a project under contract, credit eligibility turns in part on the contractual allocation of rights and risks. A taxpayer must be able to demonstrate whether: (1) it retains rights to its research; (2) the project was funded by the customer; and (3) which party bears financial risk.

Hot off the Press: Fifth Circuit Affirms *Grigsby*

Products: Based on the evidence provided, the 5th Circuit agreed that there was no “genuine dispute” as to whether Cajun’s *products* constituted business components. They did not.

Construction Processes: The Court did not address the merits of the taxpayer’s construction *processes* argument, agreeing that the claim was procedurally barred under the Federal Rule of Civil Procedure.

“Without a viable business component, the Representative Projects are not eligible for the tax credit, and the Government is entitled to summary judgment as a matter of law.”

Funded Research: Based on its analysis of the relevant contracts, the 5th Circuit agreed that Cajun’s research was “funded” and therefore not credit eligible, either because it did not retain substantial rights in the research (in 3 of the 4 projects) or because the customer clearly paid for the research.

“Ultimately, ‘it is hard to see what rights—much less what substantial rights’ Cajun retained in its undefined research. After assigning away all rights to work developed during each Representative Project, Cajun retained no substantial rights in its research.”

Hot off the Press: Fifth Circuit Affirms *Grigsby*

East Bank Project Analysis

- “Appellants’ argument that all contracts “for the product or result” are not funded **improperly conflates “amounts payable under any agreement that are contingent on the success of the research” with contracts for products or services.**
- Simply put, **the East Bank contract was not contingent on the success of the research because Appellants admit that “none of Cajun Industries’ payment was for merely conducting research.”** Indeed, Appellants’ briefing admits “payments to Cajun Industries were not contingent upon whether Cajun Industries conducted research activities.”
- **However, *Fairchild* and *Geosyntec* do not stand for the proposition that all fixed price contracts are per se not funded.** Indeed, *Geosyntec* found that the fixed price contract at issue *was* funded. Furthermore, even if this Court agreed that the Regulations allocate the tax credit to the party bearing the risk of unsuccessful research, Cajun was compensated for all risks associated with the East Bank Project.
- **Finally, the East Bank Project was funded for the simple reason that Cajun was compensated for all expenditures incurred and claimed when it sought the tax credit....** Cajun was compensated under the East Bank contract for “all general foremen, foremen, labor, [and] teams” as well as Cajun’s “superintendence, general expense and profit.” Cajun accepted this payment as “full compensation for furnishing all the labor, materials, tools, equipment, etc., needed to complete the whole work of the contract.” Therefore, **Cajun was fully compensated for all wages and labor, making these expenditures funded under any plain meaning of the term.**



Harper v. Commissioner,
T.C. Memo. 2023-57

Overview of *Harper*

- Research credits claimed by HCC, a construction firm and general contractor specializing in military design-build projects
- Projects during the claim years included construction of aircraft hangars, maintenance facilities, recruit barracks, college buildings, medical clinics, fitness centers, parking garages, training facilities, and a solar-powered water tank
- Projects proceeded through job bid, conceptual design, design development, documentation, and construction “phases”
- Representative activities included estimates, costs studies, scheduling, constructability reviews, design management, green building reviews, zoning and regulatory investigation, project management, safety management, value engineering, design buildings, and as-built documentation

Rejection of IRS's Broadside on Business Components

- On summary judgment, the IRS argued that HCC failed the business component test for four reasons, all of which the Tax Court rejected:
 - **HCC never owned the new or improved buildings it constructed**
 - *"We cannot, on the record before us, dispel the notion that the designs that HCC developed were new or improved"*
 - **HCC's designs were not "products" within the meaning of the statute**
 - *"the designs could still potentially constitute processes, techniques, or inventions"*
 - **HCC did not hold its designs or the buildings "for sale"**
 - *"even if HCC did not develop any 'products' that it used or held for sale, we must still consider the processes, techniques, and potential inventions that HDD evidently developed"*
 - **HCC did not "use" the designs in a special or meaningful way as required by law**
 - *"Nothing in the statute indicates that Congress is using the word 'use' in such a special way, and we have found no contemporary dictionary definitions of 'use' that clearly conform with Respondent's interpretation"*



Betz v. Commissioner,
T.C. Memo 2023-84

Overview of *Betz*

- The taxpayers were shareholders in CPI, an S corporation that designed and supplied air pollution control systems (e.g., catalytic and thermal oxidizers)
- CPI engaged Alliantgroup (“**AG**”) to conduct an R&D tax credit study. In connection with this engagement, AG identified wage and supply QREs associated with 19 distinct projects and computed the associated credit.
- The IRS disallowed the entire amount of the credit and imposed accuracy-related penalties. The Tax Court agreed with the IRS.
- In particular, the Tax Court concluded:
 - The taxpayers failed to carry their burden of establishing that the products were pilot models, and as a result, none of the supply costs were QREs; and
 - The taxpayers failed to substantiate that relevant wage expenses were incurred in connection with the performance of qualified services, and therefore, none of the wages constitute QREs.
- Most of the opinion focused on whether the supply and wage expenditures would be treated as qualified research or experimental expenditures under section 174 (one of the four requirements under for “qualified research” in section 41).

Taxpayer's Position in *Betz*

Overview of Taxpayer QREs

Supply QREs

- Payments made to subcontractors and suppliers for the cost of fabricating, assembling, and supplying components.
- AG interviewed CPI personnel and reviewed accounting statements from 1984–1987 to determine base period gross receipts and QREs.
- AG calculated a fixed base percentage of 3.02% and average annual gross receipts of \$23,782,532 to compute the credit amount.

Wage QREs

- CPI had no formal time-tracking system to document/substantiate time spent by employees on qualifying activities in connection.
- AG therefore used estimates, allocating wages to each of the 19 projects based on information obtained during interview with CPI's VP of Engineering and the Director of Engineering.
- These interviews were the source of the underlying allocation percentages.

Tax Court's Analysis in *Betz*

Supply QREs and the “pilot model” exception

Supply QREs

- CTI’s “supply” QREs were not just payments made for the cost of supplies/physical components; they also included payments for fabrication and assembly services.
- Section 174 only allows a deduction for expenditures of an investigative nature—not for construction or manufacturing.
- The “pilot model” exception only applies if taxpayer can show that the purpose of the representation or model was to evaluate and resolve uncertainty about capability, method or appropriate design.
- The Tax Court said the taxpayers never made such a showing.

Tax Court's Analysis in *Betz*

Wage QREs

The Court individually evaluated all 19 projects* to determine whether associated wage QREs satisfied the section 174 test. In each case, the Tax Court found that the taxpayer failed to provide evidence as to:

- ✓ what investigative activities were performed,
- ✓ what additional, unavailable information was needed,
- ✓ whether the activities in question were part of a "process of experimentation," and/or
- ✓ a reasonable basis to approximate the wage QREs corresponding to these activities

*The parties didn't agree to a sample set approach.

Key Takeaways from the Tax Court's Opinion

"To substantiate wages paid or incurred for qualified services, the taxpayer need **not** necessarily maintain and produce contemporaneous time-tracking records for its employees," however, it must make a **threshold showing** that a particular employee performed activities that constituted qualified services with respect to a business component."

Wage QRES

The Pilot Model Exception

"Taxpayer must show how it used the pilot model **to evaluate and resolve uncertainty** about the product."

"[W]e must reject petitioners' blanket assertions that uncertainty existed with respect to the products as a whole simply because of the mere 'prospect of revising or altering the design' before completion of onsite testing."

"[P]etitioners must show that (1) information was not available to CPI establishing the appropriate design of the oxidizers and (2) CPI undertook investigative activities intended to discover such information."

"Merely identifying a project difficulty and the eventual design solution, without bridging the gap with evidence as to what investigative activities were performed, does not satisfy petitioners' burden."

Section 174 Expenditure?

Penalties Sustained against Taxpayer

- The Tax Court sustained accuracy-related penalties against the taxpayer, although no good faith/reasonable cause defense was presented

***J.G. Boswell Co. v.
Commissioner (Order,
Tax Ct. July 2022)***

Overview of *Boswell*

- Involved QREs claimed for supply and labor costs for a large farming business to conduct agricultural research trials on cotton, tomatoes, alfalfa hay, etc.
 - “Research acres” (7%) versus “production acres” (93%)
- Tax Court entered an order denying Boswell’s and IRS’s cross-motions for summary judgment
- Based on *Union Carbide*, rejected Boswell’s argument that production-type costs were QREs even when the research is focused on a production *process*
- However, refusing to extend *Union Carbide*, rejected the IRS’s argument that expenditures that would have been incurred in the taxpayer’s standard production process were disqualified “even if the research seeks to improve the product rather than the process alone”



Rejection of IRS's "Indirect" Argument

"Petitioner pays for irrigation and weed control on both the research acres and the production acres, for example, but these activities are much closer to the research process than the activities of administrative personnel who account for these costs, which the regulation excludes from direct support."

Rejection of IRS's Broadside on Production-Type Costs

"To the extent respondent invites us to interpret Treasury Regulation § 1.41-2 to exclude from QREs all expenditures a taxpayer would have incurred had it used its standard production process, even if the research seeks to improve the product rather than the process alone, we decline the invitation"

"If petitioner demonstrates that its tests of the viability of the improved crops are section 41(d) qualified research ... the trial crops it produced were experimental models, and the associated costs are QREs to the extent permitted by section 41(b). Respondent cannot defeat any such argument simply by demonstrating that petitioner would have incurred the expenditures had it used its standard production processes on the research acres."

Conclusion

To illustrate, imagine that a taxpayer tests two experimental production processes designed to improve on its standard process for producing Product X. In Test A, the taxpayer evaluates an experimental process designed to produce an improved product, Product X+. Test B, on the other hand, should yield the same Product X in greater quantity or at lower cost than the standard process. Section 41(d)(2)(C), Union Carbide, and Treasury Regulation § 1.41-4(b)(1) tell us that if Test B involves qualified research at all, the taxpayer conducts such research on the production process alone. The Court must allocate the taxpayer's expenditures on Test B between product and process, and exclude the former from QREs....

We deny both Motions so we may determine (1) which of petitioner's 55 research trials sought to improve petitioner's production process alone, as opposed to one of its products, (2) which disallowed QREs associated with these research trials petitioner would not have incurred had it cultivated the research acres as production acres, and (3) the amount of QREs incurred in the remaining research trials.

Biography



Alex Sadler

Washington, DC

+1.202.739.5182

alex.sadler@morganlewis.com

Alex Sadler represents clients in complex tax controversies and litigation. He has litigated numerous tax cases in the US Tax Court, US Court of Federal Claims, and federal district and appellate courts, and has served clients in several extended tax trials. Alex has also helped clients resolve tax disputes in audits and administrative appeals with the Internal Revenue Service.

A focus of Alex's practice is the research and development tax credit—a valuable corporate tax incentive. Alex is the author of the treatise "Legal Guide to the Research Credit" published by *Thomson Reuters*® and is a frequent speaker on the topic. He has litigated several research credit cases and helped clients resolve research credit issues with the IRS without litigation.

Morgan Lewis

Biography



Doug Norton

Washington, DC

+1.202.739.5490

douglas.norton@morganlewis.com

Douglas Norton practices tax law and focuses primarily on tax controversy. Doug has represented clients before the Internal Revenue Service, in the US Tax Court, and in US federal court. He uses his background in finance and economics to understand disputes that involve complex computations in addition to thorny tax law questions. While Doug handles a wide range of tax controversies involving individuals and corporations, he has particular experience with disputes over the research credit under section 41.

Prior to joining Morgan Lewis, Doug practiced at another firm in Washington, DC. While in law school, he participated in Stanford's Supreme Court Litigation Clinic and Community Law Clinic and was editor-in-chief of the *Stanford Journal of Law, Business and Finance*. Before law school, Doug was an economist working primarily on healthcare policy.

Morgan Lewis

Biography



Michelle Andrighetto

Boston

+1.617.341.7712

michelle.andrighetto@morganlewis.com

Michelle L. Andrighetto advises clients on a wide range of US federal and international tax matters. Michelle assists with the structuring of cross-border mergers and acquisitions, international joint ventures, internal reorganizations, related party transactions, and transfer pricing. Her experience includes matters involving subpart F, tax treaty interpretation, foreign currency transactions, and tax controversy (including administrative appeals).

Prior to joining Morgan Lewis, Michelle was a tax associate at a national law firm, as well as a tax director at Big Four accounting firm.

Morgan Lewis

THANK YOU

© 2023 Morgan Lewis

Morgan, Lewis & Bockius LLP, a Pennsylvania limited liability partnership

Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Our Beijing, Shanghai, and Shenzhen and offices operate as representative offices of Morgan, Lewis & Bockius LLP.

In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Attorney Advertising.

Morgan Lewis

Morgan Lewis **150**
YEARS

**NINTH ANNUAL
RESEARCH &
DEVELOPMENT
TAX CREDIT
SYMPOSIUM**

November 16, 2023: Chicago, IL

Section 174 Developments

Presenters: Kathleen King (Alvarez & Marsal), Mike Boenzi (Forvis), Nick Thomsen (Plante Moran)

Presenters



Mike Boenzi



Kathleen King



Nick Thomsen

Agenda

- Background
- Notice 2023-63 Guidance on Amortization of Sec. 174 Expenditures
 - Eligible activities and expenses
 - Case Study
 - Software
 - Contract research
 - Potpourri
- Legislative outlook

174 Background

- TCJA 2017 (P.L. 115-97, 131 Stat. 2054) reversed 60+ years of how R&D expenses are treated for tax
- IRC Sec. 174(b) renamed Research or Experimental Expenditures (“R&E”) to Specified Research or Experimental Expenditures (“SRE”)
- Mandatory 5-year amortization for US SRE (15-year for foreign SRE); mid-year convention
- Rev. Pro. 2000-50 Sec. 5 Costs of Developing Computer Software is obsolete
- Additional guidance
 - Method change – Rev. Proc. 2023-08 and 2023-11
 - Notice 2023-63 – Administrative guidance (Sep. 8, 2023)

Eligible Activities and Expenses

- All costs incident to the development or improvement of a product
 - Direct (labor, materials, supplies, contract research, computer hosting)
 - Costs incident to development
 - Operating (rent, utilities, overhead)
 - Patent-related expenses
 - Travel
 - Depreciation/amortization on PPE used in connection with research
 - Allocation methods (headcount, square footage, wages, specific identification...)
 - Reasonable and consistent

Ineligible Activities and Expenses

- Activities under §1.174-2(a)(6) that lack technical uncertainty
 - Quality control testing, efficiency surveys, management studies, consumer surveys, advertising or promotions, the acquisition of another's product, and research in connection with literary, historical or similar projects
- Cost of land or depreciable property used in connection with the research or experimentation
- General and administrative service departments (or functions) that only indirectly support or benefit SRE activities
- Interest on debt to finance research

174 Case Study

- In 2022, Company incurred the following:
 - \$15 million in W-2 R&D wages
 - \$1.5 million in book stock compensation expense related to R&D
 - \$2.5 million in benefits, payroll taxes, and overhead incident to development
 - \$3 million paid to foreign sub for R&D performed outside of the U.S. which included a 10% cost-plus markup
 - GAAP Capitalized software account increased from \$55 million to \$70 million
- What is the 174 capitalization for 2022?

174 Case Study

- \$20.5 million of 174 SRE subject to amortization (wages, benefits, payroll taxes, overhead, and foreign development)
 - \$17.5 million US SRE (\$1.75 million amortization deduction)
 - \$3.0 million foreign SRE (\$100 thousand amortization deduction)
- Stock compensation included in W-2 wages
- Treat change in balance of GAAP Capitalized Software Account as deductible so not capitalizing the same expenses again
- Cost-plus markup should be included as part of the 174 capitalization (Notice 2023-63 Sec. 9)

Computer Software

- The notice generally follows the guidance Rev. Proc. 2000-50 guidance on the definition of computer software
 - A computer program or routine is designed to cause a desired function(s) and the documentation required to describe and maintain that program
- Computer software includes **upgrades and enhancements** (modifications to existing software)
- Computer software includes any ancillary rights that are necessary to effect the acquisition of the title to, the ownership of, or the right to use the computer software

Software Development Activities

- Include ...
 - Planning the development of software (including gathering requirements)
 - Designing the computer software
 - Building model of the software
 - Writing source code
 - Testing
 - Modifications to address defects



but ... only until the point in time software is placed in service (IUS) or technological feasibility is established and software is ready for sale

Software Development Activities

- Exclude ...
 - Data conversion
 - Software installation (including configuration)
 - Training
 - Business reengineering
 - Maintenance (not upgrade or enhancement)
 - Data or information base
 - Distribution activities
 - Customer support

Research Performed Under Contract

- A service provider must capitalize its R&E costs incurred under contract with respect to a "SRE product" if the service provider either has rights to the research **or** financial risk (Notice 2023-63 Sec. 6)
 - 1. Financial risk** – risk that the research provider may suffer a financial loss related to the failure of the research
 - *Observation:* degree of financial risk required to trigger application of Sec. 174 is not specified
 - 2. Rights to the research** – ability to use or exploit the results of the research or any resulting SRE product in provider's trade or business.
 - *Observation:* Does a non-exclusive, royalty-free license to use research recipient's IP trigger application of Sec. 174?
 - *Observation:* Is a related-party license to use SRE product treated as an ownership right for research provider? Could result in "double-capitalization" scenario.
 - Mere know-how gained through the performance of research services, which domestic and foreign law do not protect, are not within the definition of a SRE product.

Research Performed Under Contract – Rights to Research

- Rights to the research – generally defined as the ability to use or exploit the results of the research or any resulting SRE product in a trade or business.
 - Law of economics - considers whether the taxpayer's rights and resources are such that the taxpayer has an opportunity to engage in a trade or business, with respect to the results of the research, that is economical. This generally involves consideration of the taxpayer's current capability and resources, the cost and availability of additional resources needed to commercially exploit the results and other factors such as the market potential if commercialized.
 - Law of contracts - considers whether the research provider has legal rights which allow him to exploit the results of the research, if successful, in a trade or business related to the associated product.
 - Research provider does not have the right to exploit the SRE product if such right is available to the research provider only upon obtaining approval from another party to the research arrangement that is not related to the research provider (Notice 2023-63, Sec. 6.04)

Research Performed Under Contract Example – Transactions with Foreign Parent

Foreign parent pays US Sub to perform lab testing services to support foreign parent's R&D efforts. US sub makes no sales of products or services other than lab services to foreign parent.

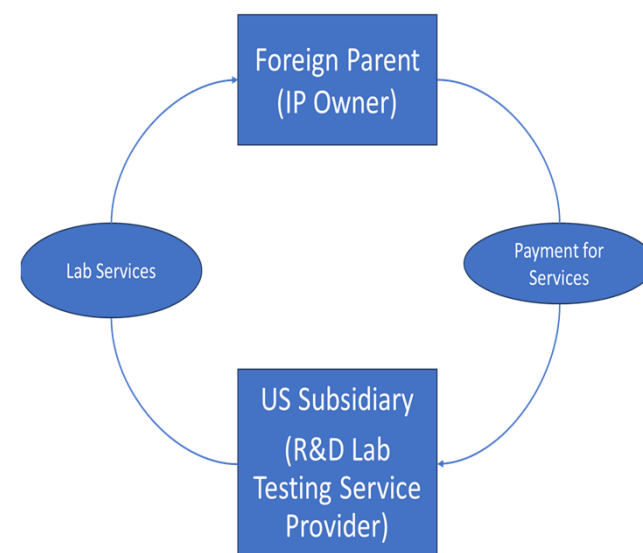
Issues: How does US Sub account for costs incurred in providing lab services? How is US R&D credit allocated between controlled group members?

Analysis: Taxpayers must analyze structure and economics of related party arrangements to determine if the research is "in connection" with Taxpayer's trade or business.

Results

Section 174: US Sub's cost to perform R&D services is not in connection with US Parent's trade or business and therefore is not considered Specified Research Expenditures (SREE). Therefore, US sub would not capitalize these costs under Section 174. Foreign parent, would be required to capitalize these costs under Section 174 and amortize over 5 years since the R&E was performed domestically.

Section 41: § 1.41-6(c) provides that the group credit is allocated to each member of the controlled group on a proportionate basis to its share of the aggregate qualified research expenses



Potpourri – Long-term Contracts

- Long-term contracts §460 (Notice 2023-63 Sec. 8)
 - Amend §1.460 to provide that the costs allocable to a long-term contract using percentage of completion method (PCM) include amortization of SRE expenditures under §174(a)(2)(B) as opposed to the capitalized amount of such expenditures
 - Amortization is treated as incurred for purposes of determining the percentage of contract completion as deducted
 - Open: Do estimated total allocable contract costs *include all SRE expenditures that directly benefit* or are incurred by reason of the performance of the long-term contract **or** Do total allocable contract costs *only include the portion of the SRE expenditures expected to be amortized* during the term of the contract?

Potpourri – Research Credit & Method of Accounting

- 174 Pilot model definition under § 1.174-2(a)(4) - any representation or model of a product that is produced to evaluate and resolve uncertainty concerning the product during the development or improvement of the product.
 - Impact on Sec. 41 research credits
- Simplified methods/safe harbors
- Method of accounting
 - Rev. Proc. 2023-8 and 2023-11
 - Cutoff basis
 - Audit protection first year only

Potpourri – Cost Sharing Regulations

- Coordination with cost sharing regulations §1.482-7 (Notice 2023-63 Sec. 9)
 - Examples from Notice
 - Ordering principle for reducing IDCs
 - Amounts charged to a capital account (174)
 - Deductible
 - Arm's length rental charge for land and tangible property – leftover is treated as income

Potpourri – Disposition, et al

- Disposition, retirement or abandonment (Notice 2023-63 Sec. 7)
 - Any property with respect to which SRE expenditures are paid or incurred is disposed of, retired, or abandoned during the applicable §174 amortization period, no recovery is allowed with respect to the unamortized SRE expenditures...must amortize over the remainder of the applicable §174 amortization period
 - Transactions occurring before the midpoint of the taxable year
 - Transaction in which corporation ceases to exist §381(a)
 - Anti-abuse exception
- Comment deadline – Nov. 24, 2023

Legislative Outlook

- H.R. 2673 American Innovation and R&D Competitiveness Act of 2023 (167 cosponsors)
- S.866 American Innovation and Jobs Act (39 cosponsors)
- Several other bills introduced

Biography



Mike Boenzi
FORVIS

Mike is a leader in FORVIS's R&D Tax Credit Services practice. For more than 23 years, he has helped both private and public clients across a wide range of industries implement and document the tax credit—from startups and middle-market firms to Russell 1000 and Fortune 500 companies. Mike also helps clients take advantage of a suite of federal tax credits and incentives related to innovation, employment activities, real estate and capital investment, and energy efficiency and sustainability. As a recognized technical expert for R&D tax credit issues, he provides technical consultation to engagement teams and oversees the technical review of all engagements. He also participates in IRS national initiatives related to the credit and is involved in every examination with R&D credit issues.

Prior to joining FORVIS, Mike spent several years in a leadership role with the R&D credit and global credits and incentives practice of an international firm. Mike is a member of the American Institute of CPAs, Illinois CPA Society, National Association of Manufacturers, and Illinois Technology Association. He is a graduate of the University of Illinois, Chicago, with a B.S. degree in accountancy.

Morgan Lewis

Biography



Kathleen King

kking@alvarezandmarsal.com

Kathleen is a managing director of Alvarez & Marsal Taxand and has more than 25 years of experience advising corporate clients on federal tax matters. She helps clients claim, document, and sustain tax incentives, including federal and state research tax credits, investment credits, energy credits, payroll-based credits, fixed asset treatment, and meals and entertainment deductions. Her projects range from targeted consulting engagements designed to address a specific issue to large-scale projects utilizing engagement teams working concurrently in multiple locations. She has advised clients in various industries, including aerospace and defense, food products, manufacturing, financial services, pharmaceutical products, and IT/software. She previously served as a National Office for the research credit services teams at Big Four accounting firms. She's written numerous articles and regulatory comments on the research credit and frequently speaks on research credit issues.

Kathleen is a CPA and earned her B.S. in mineral land management from the University of Colorado and M.Acc. in accounting from American University.

Morgan Lewis

Biography



Nick Thomsen

Plante Moran

As a Senior Manager in Plante Moran's tax solutions group, Nick specializes in helping companies find ways to qualify for a range of federal and state tax credits and deductions, with his main specialty being the research and development tax credit. He has over eight years of experience helping manufacturing, architecture & engineering, software, and food & beverage companies save money by claiming the R&D tax credit, qualified business income deduction, and employee retention credit.

Nick is a member of the AICPA and the Michigan Association of Certified Public Accountants. He received his B.S. in accounting and an M.S. in accounting with a tax specialty, both from Michigan State University.

Morgan Lewis

THANK YOU

© 2023 Morgan Lewis

Morgan, Lewis & Bockius LLP, a Pennsylvania limited liability partnership

Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Our Beijing, Shanghai, and Shenzhen and offices operate as representative offices of Morgan, Lewis & Bockius LLP.

In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship.

Prior results do not guarantee similar outcomes. Attorney Advertising.

Morgan Lewis

Morgan Lewis **150**
YEARS

**NINTH ANNUAL
RESEARCH &
DEVELOPMENT
TAX CREDIT
SYMPOSIUM**

November 16, 2023: Chicago

What is Happening at the Internal Revenue Service? New Funding, Staffing, Campaigns, and Approaches to Taxpayer Compliance

Presenters: Jennifer Breen

Morgan Lewis **150**
YEARS

**NINTH ANNUAL
RESEARCH &
DEVELOPMENT
TAX CREDIT
SYMPOSIUM**

November 16, 2023: Chicago, IL

The Research Credit Refund Claim Directive 2 Years Later – Practitioner Experiences and Strategies for Successfully Navigating the New World Order

Presenters: Daniel Mennel (Cherry Bekaert), Matt Hunt (ABGI-USA), AJ Schiavone (Crowe), Catie Ely (MASSIE R&D Tax Credits), Star Fischer (Moss Adams)

Presenters



Daniel Mennel
(Cherry Bekaert)



Matt Hunt
(ABGI-USA)



AJ Schiavone
(Crowe)



Catie Ely
**(MASSIE R&D
Tax Credits)**



Star Fischer
(Moss Adams)

Agenda

- Court Cases – The Road to Research Credit Refund Claim Directive
- Research Credit Refund Claim Directive Requirements & Timeline
- Characteristics of Approved Responses
- Evaluation Structure
- Trends and Looking Ahead: Where is This Headed?

Court Cases – The Road to Research Credit Refund Claim Directive

What is the Refund Claim Directive?

Research Credit Claims (Section 41) on Amended Returns Frequently Asked Questions

Individuals

Businesses and Self-Employed

Business Tax Account

Small Business and Self-Employed

Large Business

Corporations

e-file for Large Business and

Introduction

Existing Treasury Regulations require that for a refund claim to be valid, it must set forth sufficient facts to apprise the IRS of the basis of the claim. For a refund claim involving a Credit for Increasing Research Activities under I.R.C. § 41 (Research Credit) to be valid, taxpayers are required to provide the following information at the time the refund claim is filed with the IRS:

1. Identify all the business components to which the Section 41 research credit claim relates for that year.
2. For each business component, identify all research activities performed and
3. name the individuals who performed each research activity,
4. as well as the information each individual sought to discover.
5. Provide the total qualified employee wage expenses, total qualified supply expenses, and total qualified contract research expenses for the claim year. This may be done using Form 6765, Credit for Increasing Research Activities.

Harper v. United States,
Case No.: 18cv2110 DMS (LL) (S.D. Cal. Apr. 25, 2019)

Because Plaintiffs “neither identify any specific work they performed in these periods nor applied the statutory test to such work to determine whether, and what amount of, that work constituted qualified research,” (*id.*), they did not provide to the IRS any factual bases for their claims for refund.

Lead Up to *Harper*: *Quebe* and *CRA Holdings*

- *United States v. Quebe*, 321 F.R.D. 303, 306-309, 313 (S.D. Ohio, 2017) (sanctioning taxpayers for failing to comply with the court's order requiring them to identify the business components comprising their claim, name the uncertainties for each of the projects at issue, and specifically describe the alleged research that was performed by each employee)
- *CRA Holdings US, Inc. v. United States*, No. 1:15-cv-00239-EAW-LGF, slip op. at *2-*3, *9 (W.D.N.Y dismissed Sept. 20, 2019) (ordering the taxpayer to answer the government's interrogatories to identify, for each business component at issue, each employee the taxpayer alleged performed qualified research activities, the specific activities each employee performed, the dates the activities were performed, the amount of time spent by each employee performing such activities, and the amount of alleged qualified research expenses associated with the activities, noting that whether the taxpayers' wage expenses associated with the projects at issue are for "qualified services" under I.R.C. § 41 is "essential" to the taxpayer's claim).

Research Credit Refund Claim Directive Requirements and Timeline

Overview of Requirements

- Valid refund claim involving R&D Credit must include the following information:
 1. Identify ALL business components for which credit is sought
 2. For EACH business component, identify all research activities performed
 3. Name all individuals who performed each research activity
 4. Information each individual sought to discover
 5. QRE Summary (wage, supplies, computer rental, and contract research)

*Stat samples provide information for sampled units for items #1-4

IRS provided example on FAQ #20

<https://www.irs.gov/businesses/corporations/research-credit-claims-section-41-on-amended-returns-frequently-asked-questions>

Timeline

CCM originally released **October 15, 2021**: Requirement to include the 5 items with timely filed research credit claims for refund starting **January 10, 2022**

January 5, 2022 – timeframe to perfect claim modified to **45** days

April 19, 2022 – taxpayers must provide the 5 items of information for refund on R&D credit from pass-through entity

September 30, 2022 – transition period extended **through January 10, 2024** where taxpayers are provided 45 days to perfect claim

October 30, 2023 – transition period extended **through January 10, 2025** where taxpayers are provided 45 days to perfect claim



Characteristics of Approved Responses

Content of Submissions

What we know

- IRS has grouped the individuals reviewing claim submissions under the title “classifiers”
- Classifiers are not directly accessible for feedback
- If classifier deems claim submission insufficient, they send Ltr 6425C
- Person named on Ltr 6425C is not the classifier, and is also inaccessible based on the contact information of the letter

What we do not

- What training, instruction, or guidance has been given to the classifiers
- What amount of quality assurance the IRS has committed to the process
- To what extent the IRS has tracked the metrics of claims which are deemed insufficient

Content of Submissions

Do this

- Create a memorandum that specifically addresses the CCA 5 Items of Information
- Describe business component with enough detail to for a classifier to determine what the research relates to
- Describe with sufficient detail information the taxpayer sought to discover
- Make the information easy to find for the classifier

Not that

- Attach a study
- Use business component groupings or simply business component type
- Describe research activities with language that is conclusory or otherwise restates Code requirements
- “Paper bomb” the classifier

Guidance

- Research Credit Claims (Section 41) on Amended Returns Frequently Asked Questions
 - Includes a feedback email irs.feedback.recredit.claims@irs.gov
- Memorandum LB&I-04-0122-0001
 - Gives some guidance to classifiers on what satisfies the required information and form
- IRM Procedural Update wi-21-0523-0643
 - Provides some understanding of the procedures while resubmissions are under review

Content of Submissions

IRS Department of the Treasury
Internal Revenue Service

OGDEN UT 84201-0038

In reply refer to: [REDACTED]
July 29, 2022 LTR 6426C

Taxpayer identification number: [REDACTED]
Tax period: Dec. 31, 2020
Form: 1120

Dear Taxpayer:

We cannot process your claim for the Section 41 Credit for Increasing Research Activities for the tax period above because you didn't describe, in detail, each ground for which you're claiming the refund or credit, or provide sufficient facts supporting your claim, as required by Treasury Regulation Section 301.6402-2.

For us to consider your claim, you must provide a written statement that identifies:

- All the business components to which the Internal Revenue Code Section 41 research and experimentation credit relates for the claim years.
- All the research activities performed for each business component to which the Internal Revenue Code Section 41 research and experimentation credit relates for the claim years.
- All the individuals who performed each research activity for each business component to which the Internal Revenue Code Section 41 research and experimentation credit relates for the claim years.
- All the information each individual sought to discover for each business component to which the Internal Revenue Code Section 41 research and experimentation credit relates for the claim years.

For the fastest resolution please respond by fax to the fax number listed below and include [REDACTED] as the contact name.

Please send us the requested information within 45 days from the date of this letter. You can mail it to the address at the top of the first page of this letter or fax it to [REDACTED] using either a fax machine or an online fax service. Several online fax services use the internet to send files from your computer or smart device to a fax number.

If we don't receive your information or receive insufficient information, we cannot consider your claim for refund or credit.

LTR 6426C

- All the business components to which the Internal Revenue Code Section 41 research and experimentation credit relates for the claim years.
- All the research activities performed for each business component to which the Internal Revenue Code Section 41 research and experimentation credit relates for the claim years.
- All the individuals who performed each research activity for each business component to which the Internal Revenue Code Section 41 research and experimentation credit relates for the claim years.
- All the information each individual sought to discover for each business component to which the Internal Revenue Code Section 41 research and experimentation credit relates for the claim years.

Content of Submission

Considerations in responding to Ltr 6426C

- Evaluate what was actually filed
- Read the Ltr 6426 carefully
- Do not resubmit the same information
- Make response comprehensive, but concise
- Respond using a trackable method
- Paper your file

Evaluation Structure

Understanding of how it is evaluated, structure of the evaluation

- The IRS is always “**risking**” cases and issues and doing **comprehensive risk analysis**.
- The LB&I Campaigns are a form of risking.
- We have **Centralized Risking of Research Issues** Under IRC 41 and 174
 - The **Research Risk Review Team (“RT”)** is a national strategy to improve the identification of the highest risk research issues.
 - The RT consists of subject matter experts, engineers, revenue agents, and other specialists.
 - The “RT promotes compliance” by focusing its efforts on helping identify high risk returns and claims, and engaging in knowledge sharing through collaboration.
 - “Taxpayers and examination teams will benefit from a comprehensive risk analysis that provides a proper depth and scope of the exam which supports a consistent direction for the efficient examination of research issues.” IRM 4.46.3.2.6.8 (1-23-2023).

CLASSIFIER:

Is the claim valid?



Until Jan 10, 2025, (Transition period) taxpayer can perfect the claim

Understanding of how it is evaluated

After Jan 10, 2025, claim is deficient and rejected. "Lack of sufficient facts required by specificity requirement."



RISKING TEAM:

Is an examination needed?



You need both grounds and sufficient facts to form basis of refund claim. Taxpayer must have a valid refund claim, otherwise federal courts don't have jurisdiction to review the IRS denial.



Understanding of how it is evaluated, structure of the evaluation

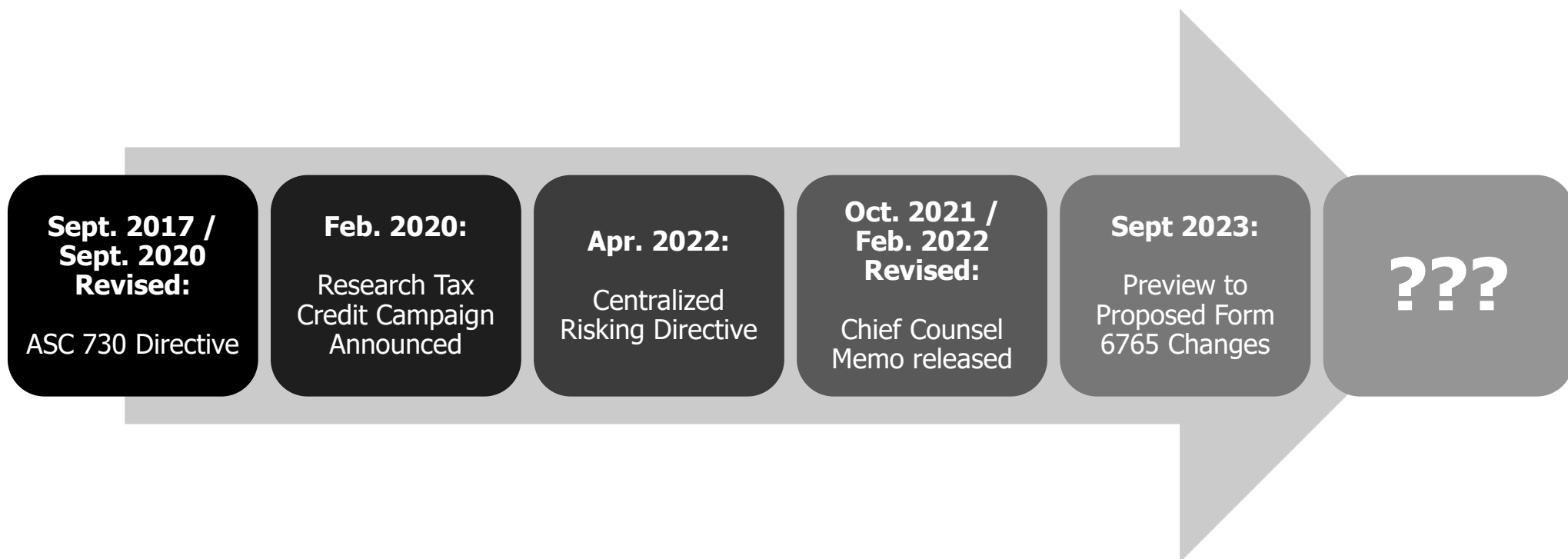
PROBLEMS

- Lack of Resources- Big Backlog
- Lack of Training- Inconsistent Results
- Running of the Statute of Limitations
- No transparency as to where the claim stands



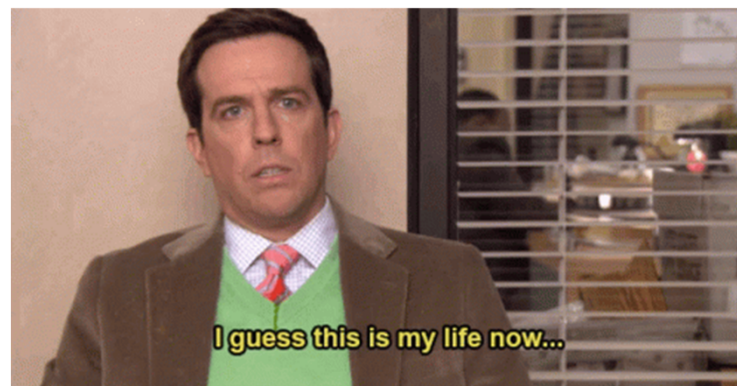
Trends & Looking Ahead: Where is this headed?

Trends & Looking Ahead – Where is this headed? A Timeline



Trends & Looking Ahead – Where is this headed?

- Expectations vs. Reality
- Competing priorities (IRS vs. Taxpayer vs. Service Provider)
- Increased focus on business component nexus
- Uncertainty on the use of stat samples and ASC 730 Directive



Trends & Looking Ahead – Where is this headed?

CCM vs. Proposed Form 6765

Requirement	CCM	Proposed Form 6765
Identify all the business components to which the Section 41 research credit claim relates for that year	Included	Included
For each business component, identify all research activities performed	Included	Included
For each business component, name the individuals who performed each research activity	Included	Not Included
For each business component, identify the information each individual sought to discover	Included	Business component level
Provide the total qualified employee wage expenses, total qualified supply expenses, and total qualified contract research expenses for the claim year	Included	Included

- Several overlapping requests
- Focus on business component reporting: impact on *when* this information is presented
- Pattern of increased compliance burden for taxpayers

Trends & Looking Ahead – Where is this headed? Opportunities? Risk?

- **States?**

- Many states piggyback off federal requirements
- Certain states are becoming increasingly sophisticated / aggressive on claims

- **Proactive planning for a retrospective claim?**

- Data strategy; what's available and what approach?



Biography



Daniel Mennel

San Francisco, CA

Dan.Mennel@cbh.com

Dan is a Tax Partner at Cherry Bekaert and helps lead the Tax Credits & Incentives Advisory practice's Credits and Accounting Methods practice. He focuses on Federal Credits and Incentives in key industry areas, such as technology, food and beverage, software development, manufacturing, and med-tech. Dan also is responsible for helping the Firm expand into the West Coast region. With more than two decades of experience, Dan helps clients with performing studies, implementing R&D software solutions and negotiating IRS and State Agency settlements. Dan has led large client teams (Fortune 100) as an overall account owner, and was previously a Tax Partner with a top 10 accounting and advisory firm, serving as the West Region Leader of his tax business line. Prior to that he spent over 10 years with a Big Four Firm building its R&D Practice in the West.

Dan is a CPA and received his BS in Accounting from Indiana University.

Morgan Lewis

Biography



Matt Hunt

Chicago, IL

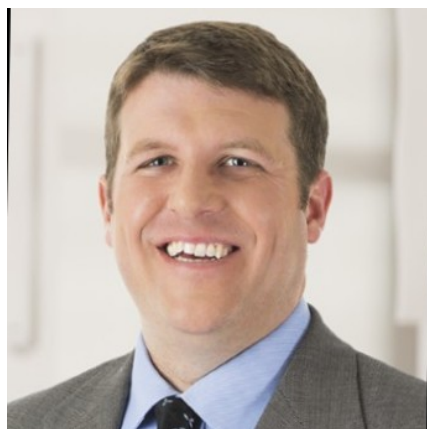
Matt.Hunt@ABGi-USA.com

As ABGi's National Director of CPA Relationships and Alliances, Matt leads a team responsible for partnering with CPA firms across the country to identify clients that can utilize various specialty tax incentives. Matt works with hundreds of CPA firms across the country and led the firm's response to Section 174 amortization and its technical implications for ABGi clients. He teaches CPE classes relating to the R&D tax credit, 179D deduction, Section 174 amortization, and has presented on the Future of Tax Incentives. Matt has over 20 years in the accounting industry, starting at Grant Thornton, and after leaving, built, and led Internal Audit Departments in both publicly traded and private organizations with revenues ranging from \$3 billion to \$125 billion.

Matt is a CPA and CFE and earned his BS in Finance and Accounting from Indiana University and his MBA in Financial Management and Control from DePaul University.

Morgan Lewis

Biography



AJ Schiavone

Columbus, OH

AJ.Schiavone@crowe.com

AJ is a Partner in Crowe's Federal Tax Consulting Services practice. He serves as a leader in the firm's credits and incentives team which specializes in assisting companies with maximizing federal and state R&D Tax Credits. He routinely works with large and mid-sized businesses in the manufacturing, technology, software, and life sciences industries. AJ is focused on developing and tailoring customized work plans which strategically highlight and document taxpayers' R&D credit claims. He is also Crowe's R&D team technical leader, consulting with the team and clients on contentious R&D credit qualification issues such as pilot models, software development activities, funding, and IP rights. He also has experience defending R&D Credit claims at the federal and state levels.

AJ is a CPA and holds a B.B.A in accounting from the University of Notre Dame.

Morgan Lewis

Biography



Catie Ely

Dallas, TX

Cely@massietaxcredits.com

As a Director of Tax Credits, Catie aims to build strong client relationships and maximize sustainable R&D credit benefits while also minimizing disruption to client business operations.

During her 15 years as a tax professional, Catie has primarily focused on Federal and state R&D tax credits and various tax accounting methods for clients across a multitude of industries. She's previously served on Grant Thornton's National R&D Tax Credit leadership team and the tax innovation team, where she led efforts to utilize and identify technology to improve operations.

Catie is a lover of staying active and spending time with family. Catie serves as a leader in the ATA Martial Arts organization and is working toward earning a black belt in taekwondo. Catie is a CPA and holds a B.S. in Accounting from Georgia State University and earned her Master of Accounting from Kennesaw State University.

Morgan Lewis

Biography



Star Fischer

Everett, WA

star.fischer@mossadams.com

Star has practiced public accounting since 2001 and provides research and development (R&D) tax services to middle-market companies. She has provided consulting in the areas of federal and state R&D tax credits, R&E expense deductions, and IRS and state exams of R&D tax credits. She has significant experience working with S corporations and partnerships claiming the credit and understands the unique opportunities and challenges facing these types of entities. Star has performed R&D studies in many different industries. She frequently gives presentations and writes articles about R&D tax services and the tax-savings opportunities related to eligible expenditures. She was a member of the Internal Revenue Service Advisory Board Council from 2014-2017, which provides an organized public forum for IRS officials and representatives to discuss key tax administration issues.

Star also serves as the Consulting Leader for the manufacturing and consumer products industry group. In this role, she focuses on identifying and advising clients on strategy, technology, operational consulting, as well as federal & state credits and incentives.

Morgan Lewis

THANK YOU

© 2023 Morgan Lewis

Morgan, Lewis & Bockius LLP, a Pennsylvania limited liability partnership

Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Our Beijing, Shanghai, and Shenzhen and offices operate as representative offices of Morgan, Lewis & Bockius LLP.

In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship.

Prior results do not guarantee similar outcomes. Attorney Advertising.

Morgan Lewis

Morgan Lewis **150**
YEARS

**NINTH ANNUAL
RESEARCH &
DEVELOPMENT
TAX CREDIT
SYMPOSIUM**

November 16, 2023: Chicago

Federal Exam and Audit Defense Tactics

Presenters: Tricia Schweska (PwC), John Stell (PwC), Peter Todd (PwC)

Moderator: Tom Linguanti (Morgan Lewis)

Presenter



Tricia Schweska
Director, PwC



John Stell
Managing Director, PwC



Peter Todd
Partner, PwC



Tom Linguanti
Partner, Morgan Lewis

Agenda

- Update on IRS Changes
- Trends in IRS Audits
- Trends/Themes from Audits with Statistical Samples
- Other Considerations
- Q&A

Update on IRS Changes

- Investment in new resources
- IRA – 80,000 auditors and engineers
- Increased training for IRS agents and engineers
 - Fundamental legal requirements
 - How to conduct site tours
 - Requirements related to Internal Use Software
 - Funded research
 - Report writing
 - Base period
 - Supply issue
 - Engineers On-Assignment
 - ASC 730 reconciliation
 - Chief Counsel Memorandum / FFA
 - Consistency of tax positions
 - Uncertain tax position

Trends in IRS Audits - Techniques

- IDS and Audit Techniques
 - Substantially all (Little Sandy Coal)
 - Prevalent in IDRs; less follow up
 - IRS ignoring 7th Circuit opinion except in 7th Circuit
 - Recommend providing analysis of direct research vs. supervision vs. support
 - Business components
 - IRS contends it was always in the law
 - Extensive emphasis on audit to establish business components
 - Recent experiences in Appeals
 - Significant numbers of new resources

Trends in IRS Audits - Procedural

- Procedural Issues
 - Recording/Transcription
 - Resistance to use of court reporter
 - LB&I is working on a policy for agents/engineers/public
 - Walk-through Presentations
 - Best practice for delivery of IDR responses
 - AOF: Springboard for settlement or entry to Appeals
 - Use of surrogates in interviews

Trends in IRS Audits - Procedural

- Procedural Issues
 - Field level resolution
 - Issues one by one
 - Stay at Exam level
 - Work up IRS chain of command (rules of engagement)
 - Memorandum of Understanding (MOU) vs. Closing Agreement (Form 906)
 - Use of IRS Counsel for risks and rights assessments
 - Campaign cases vs. Regular R&D cases
 - Risk assessment team involvement

Trends in IRS Audits – CCM / FAA 2 years later

- IRS Guidance associated with Refund Claims
 - Issued 10/15/2021
 - One Year Grace Period - Extended
 - 30-day perfection period extended to 45 days
 - 5 Requirements
 - IRS Feedback on Submissions

Trends in IRS Audits – MITRE

- Revamping the use of MITRE
 - IRS is seeking to monitor the use of MITRE
 - Previous memo that outlined a dollar threshold of MITRE involvement has been eliminated
 - Determination of whether MITRE is used relates to whether the case will “benefit” from the use of MITRE
 - MITRE would be used on software cases that appear to be high risk and may relate to the type of software that the taxpayer was claiming

- Statistical sampling issues being raised
 - Implications of *Little Sandy Coal*
 - Small sample sizes overall and sample size per stratum
 - Potential QREs (PQRE) as the sample unit; i.e., estimated qualification rate x W-2 wages
 - Reconciliation of W-2 wages in sampling frame with wages per Forms 941 or W-3 and of contract research and supply expenses with GL accounts
 - Linkage of sampled employee's qualified time/wages with specific business component
 - Application of shrink-back to sampled business components under substantially-all test
 - Introduction of bias when using seed values to generate random numbers

- Statistical sampling issues being raised
 - Sample size and sample size per stratum (*Phoenix Design*)
 - Sampling methodologies to streamline large populations and IRS audits of same
 - Employee vs. job-based samples
 - Affirmative use by taxpayer vs. IRS use in audit
 - Satisfying the substantially all test when a sample is used
 - Business components (respect for sample units)
 - Interview process (extent, approach)
 - Sample units for credit vs. base years

Biography



Tricia Schweska

PwC

tricia.schweska@pwc.com

Tricia is a Tax Director in PwC's Specialized Tax Services practice, based in the Chicago office. Tricia has more than 19 years of experience in tax consulting with a focus on R&D tax credits and Section 174 Research and Experimental Expenditure calculations. Tricia directs R&D credit and Section 174 projects for a variety of clients/industries, including pharmaceuticals, software development, industrial equipment, and many others, with an emphasis on leveraging technologies, including statistical sampling and Alteryx, to maximize effectiveness and resulting tax savings.

Tricia has a B.S. in accounting and an M.S. in taxation from the University of Illinois at Urbana- Champaign. Tricia is a Certified Public Accountant licensed to practice in Illinois and Arizona and is a member of the AICPA.

Morgan Lewis

Biography



John Stell

PwC

john.l.stell@pwc.com

John is a managing director in PwC's National Economics and Statistics group, where he is a nationally recognized specialist in the use of statistical sampling for tax compliance. He combines an understanding of technical tax issues, IRS procedures, and statistical sampling to help clients efficiently analyze large amounts of data and successfully navigate IRS audits. John works with clients from diverse industries and a wide range of projects, covering areas such as research tax credits, fixed asset depreciation, meals and entertainment deductions, foreign tax credits, section 1441 withholding, and state sales and use taxes. He combines strong quantitative skills with strong technical tax knowledge to help clients address the challenges of tax compliance.

John holds an M.A. in economics from the University of Maryland-College Park and an A.B. in economics from Princeton University. He is a member of the American Economics Association and American Statistical Association.

Morgan Lewis

Biography



Peter Todd

PwC

peter.todd@pwc.com

Peter Todd is a Tax Partner with over 18 years of experience at PwC, based in the New York office. He is in PwC's Specialized Tax Services Practice and specializes in R&D tax credits. He advises large and midsize multinational corporations in the consulting, financial services, technology, pharmaceutical, retail and consumer, and entertainment and media sectors. Peter has also worked in the PwC Washington National Tax Services practice in Washington, DC.

Peter received a B.A. in accounting and finance and an M.P.Acc. in Taxation at the University of Washington and is a CPA.

Morgan Lewis

Biography



Tom Linguanti

Morgan Lewis

Chicago

T: +1.312.324.1486

E: thomas.linguanti@morganlewis.com

Thomas V. Linguanti represents clients in complex tax controversies and tax litigation. He assists clients in determining the appropriate strategy in disputes with the US Internal Revenue Service during audit, alternative dispute resolution proceedings, and trial and appellate litigation.

Tom represents both US and non-US corporations, as well as individuals. He began his tax litigation career as a trial and appellate attorney in the Tax Division of the US Department of Justice.

Morgan Lewis

THANK YOU

© 2023 Morgan Lewis

Morgan, Lewis & Bockius LLP, a Pennsylvania limited liability partnership

Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Our Beijing, Shanghai, and Shenzhen and offices operate as representative offices of Morgan, Lewis & Bockius LLP.

In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Attorney Advertising.

Morgan Lewis