

# STATE OF NEW YORK

2670--B

2017-2018 Regular Sessions

## IN ASSEMBLY

January 20, 2017

Introduced by M. of A. LENTOL, TITONE, COLTON, BRINDISI, NIOU, HARRIS, McDONALD, CARROLL, COOK, JENNE, PEOPLES-STOKES, HEVESI, JAFFEE, D'URSO, ABBATE, BLAKE, CRESPO, MORELLE -- Multi-Sponsored by -- M. of A. HYNDMAN -- read once and referred to the Committee on Ways and Means -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- again reported from said committee with amendments, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the tax law and the economic development law, in relation to the creation of the empire state music production credit and the empire state digital gaming media production credit; to repeal subdivision 13 of section 352 of the economic development law relating thereto; and providing for the repeal of certain provisions upon expiration thereof

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The tax law is amended by adding a new section 44 to read as follows:

§ 44. Empire state music production credit. (a) Allowance of credit. (1) A taxpayer which is a music production entity engaged in qualified music production, or who is a sole proprietor of or a member of a partnership, which is a music production entity engaged in qualified music production, and is subject to tax under article nine-A or twenty-two of this chapter, shall be allowed a credit against such tax to be computed as provided herein.

(2) The amount of the credit shall be the product (or pro rata share of the product, in the case of a member of a partnership or limited liability company) of twenty-five percent and the eligible production costs of one or more qualified music productions.

(3) Eligible production costs for a qualified music production incurred and paid in this state but outside such metropolitan commuter

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD03921-07-7

1 transportation district shall be eligible for a credit of ten percent of  
2 such eligible production costs in addition to the credit specified in  
3 paragraph two of this subdivision.

4 (4) Eligible production costs shall not include those costs used by  
5 the taxpayer or another taxpayer as the basis calculation of any other  
6 tax credit allowed under this chapter or allowed in any other state.

7 (b) Allocation of credit. The aggregate amount of tax credits allowed  
8 under this section, subdivision fifty-three of section two hundred ten-B  
9 and subsection (iii) of section six hundred six of this chapter in any  
10 taxable year shall be fifty million dollars. The aggregate amount of  
11 credits for any taxable year shall be distributed on a regional basis as  
12 follows: fifty percent of the aggregate amount of credits shall be  
13 available for qualified music productions that incur at least sixty  
14 percent of eligible production costs for a qualified music production in  
15 region one; twenty percent of the aggregate amount of credits shall be  
16 available for qualified music productions that incur at least sixty  
17 percent of eligible production costs for a qualified music production in  
18 region two; and thirty percent of the aggregate amount of credits shall  
19 be available for qualified music productions that incur at least sixty  
20 percent of eligible production costs for a qualified music production in  
21 region three. If such regional distribution is not fully allocated in  
22 any taxable year, the remainder of such credits shall be available for  
23 allocation to any region in the subsequent tax year. For the purposes  
24 of this section region one shall contain the city of New York; region  
25 two shall contain the counties of Westchester, Rockland, Nassau and  
26 Suffolk; and region three shall contain any county not contained in  
27 regions one and two. Such credit shall be allocated by the empire state  
28 development corporation among taxpayers in order of priority based upon  
29 the date of filing an application for allocation of music production  
30 credits with such office. If the total amount of allocated credits  
31 applied for in any particular year exceeds the aggregate amount of tax  
32 credits allowed for such year under this section, such excess shall be  
33 treated as having been applied for on the first day of the subsequent  
34 taxable year.

35 (c) Definitions. As used in this section:

36 (1) "Music production" means the creation of a sound recording and any  
37 related music video, either of which is intended for commercial release.  
38 A "music production" does not include recordings that are primarily  
39 spoken word or wildlife or nature sounds, or produced for instructional  
40 use or advertising or promotional purposes.

41 (2) "Qualified music production" is a music production in which eligi-  
42 ble production costs equal to or are in excess of seven thousand five  
43 hundred dollars if incurred and paid in this state in the twelve months  
44 preceding the date on which the credit is claimed. Provided, however, if  
45 such production costs are incurred and paid outside the metropolitan  
46 commuter transportation district in this state, such production costs  
47 shall be equal to or in excess of three thousand seven hundred fifty  
48 dollars to be a qualified music production for the purposes of this  
49 paragraph.

50 (3) (A) "Eligible production costs for a qualified music production"  
51 are costs incurred and paid in this state for tangible property and  
52 services used in the production of qualified music production, as deter-  
53 mined by the department of economic development, including, but not  
54 limited to: (i) studio rental fees and related costs, (ii) instrument  
55 and equipment rental fees, (iii) production session fees for musicians,

1 programmers, engineers, and technicians and (iv) mixing and mastering  
 2 services.

3 (B) Eligible production costs shall not include: (i) costs for tangi-  
 4 ble property or services used or performed outside of this state, (ii)  
 5 performance fees for featured artists or featured guest artists receiv-  
 6 ing royalties or advances on royalties or special performance fees  
 7 (other than those that would normally be collected by a performing  
 8 rights organization) pursuant to an agreement directly with the producer  
 9 or employer, (iii) salaries or related compensation for producers or  
 10 songwriters, (iv) composer, artist or producer residual royalties or  
 11 advances, (v) licensing fees for samples, (vi) interpolations or other  
 12 music clearance costs, (vii) mastering or post-production expenditures  
 13 for projects that were not principally tracked and recorded in this  
 14 state, (viii) any costs associated with manufacturing, duplication,  
 15 packaging, distribution, promotion, marketing or touring not specif-  
 16 ically outlined in this subparagraph, or (ix) local transportation  
 17 expenditures directly related to music production and provided at or to  
 18 the site of such music production. With respect to the production of a  
 19 music video, eligible production costs are those defined in paragraph  
 20 two of subdivision (b) of section twenty-four of this article. Such  
 21 total production costs incurred and paid in this state shall be equal to  
 22 or exceed seventy-five percent of total cost of an eligible production  
 23 incurred and paid within and without this state.

24 (d) Cross-references. For applications of the credit provided for in  
 25 this section, see the following provisions of this chapter:

26 (1) Article nine-A: section two hundred ten-B, subdivision fifty-  
 27 three.

28 (2) Article twenty-two: section six hundred six, subsection (i), para-  
 29 graph one, subparagraph (B), clause (xliv).

30 (3) Article twenty-two: section six hundred six, subsection (iii).

31 § 2. Section 210-B of the tax law is amended by adding a new subdivi-  
 32 sion 53 to read as follows:

33 53. Empire state music production credit. (a) Allowance of credit. A  
 34 taxpayer who is eligible pursuant to section forty-four of this chapter  
 35 shall be allowed a credit to be computed as provided in such section  
 36 forty-four against the tax imposed by this article.

37 (b) Application of credit. The credit allowed under this subdivision  
 38 for any taxable year shall not reduce the tax due for such year to less  
 39 than the amount prescribed in paragraph (d) of subdivision one of  
 40 section two hundred ten of this article. Provided, however, that if the  
 41 amount of the credit allowable under this subdivision for any taxable  
 42 year reduces the tax to such amount, the excess shall be treated as an  
 43 overpayment of tax to be credited or refunded in accordance with the  
 44 provisions of section one thousand eighty-six of this chapter, provided,  
 45 however, no interest shall be paid thereon.

46 § 3. Subparagraph (B) of paragraph 1 of subsection (i) of section 606  
 47 of the tax law is amended by adding a new clause (xliv) to read as  
 48 follows:

49 <u>(xliv) Empire state music</u>	<u>Amount of credit under</u>
50 <u>production credit under</u>	<u>subdivision fifty-three</u>
51 <u>subsection (iii)</u>	<u>of section two hundred ten-B</u>

52 § 4. Section 606 of the tax law is amended by adding a new subsection  
 53 (iii) to read as follows:

1 (iii) Empire state music production credit. (1) Allowance of credit. A  
2 taxpayer who is eligible pursuant to section forty-four of this chapter  
3 shall be allowed a credit to be computed as provided in such section  
4 forty-four against the tax imposed by this article.

5 (2) Application of credit. If the amount of the credit allowable under  
6 this subsection for any taxable year exceeds the taxpayer's tax for such  
7 year, the excess shall be treated as an overpayment of tax to be credit-  
8 ed or refunded as provided in section six hundred eighty-six of this  
9 article, provided, however, that no interest shall be paid thereon.

10 § 5. The tax law is amended by adding a new section 45 to read as  
11 follows:

12 § 45. Empire state digital gaming media production credit. (a) Allow-  
13 ance of credit. (1) A taxpayer which is a digital gaming media  
14 production entity engaged in qualified digital gaming media production,  
15 or who is a sole proprietor of or a member of a partnership, which is a  
16 digital gaming media production entity engaged in qualified digital  
17 gaming media production, and is subject to tax under article nine-A or  
18 twenty-two of this chapter, shall be allowed a credit against such tax  
19 to be computed as provided herein.

20 (2) The amount of the credit shall be the product (or pro rata share  
21 of the product, in the case of a member of a partnership or limited  
22 liability company) of twenty-five percent and the eligible production  
23 costs of one or more qualified digital gaming media productions.

24 (3) Eligible digital gaming media production costs for a qualified  
25 digital gaming media production incurred and paid in this state but  
26 outside such metropolitan commuter transportation district shall be  
27 eligible for a credit of ten percent of such eligible production costs  
28 in addition to the credit specified in paragraph two of this subdivi-  
29 sion.

30 (4) Eligible production costs shall not include those costs used by  
31 the taxpayer or another taxpayer as the basis calculation of any other  
32 tax credit allowed under this chapter or allowed in any other state.

33 (b) Allocation of credit. The aggregate amount of tax credits allowed  
34 under this section, subdivision fifty-four of section two hundred ten-B  
35 and subsection (jjj) of section six hundred six of this chapter in any  
36 taxable year shall be fifty million dollars. The aggregate amount of  
37 credits for any taxable year must be distributed on a regional basis as  
38 follows: fifty percent of the aggregate amount of credits shall be  
39 available for qualified digital gaming media productions that incur at  
40 least sixty percent of eligible production costs for a qualified digital  
41 gaming media production in region one; twenty percent of the aggregate  
42 amount of credits shall be available for qualified digital gaming media  
43 productions that incur at least sixty percent of eligible production  
44 costs for a qualified digital gaming media production in region two; and  
45 thirty percent of the aggregate amount of credits shall be available for  
46 qualified digital gaming media productions that incur at least sixty  
47 percent of eligible production costs for a qualified digital gaming  
48 media production in region three. If such regional distribution is not  
49 fully allocated in any taxable year, the remainder of such credits shall  
50 be available for allocation to any region in the subsequent tax year.  
51 For the purposes of this section region one shall contain the city of  
52 New York; region two shall contain the counties of Westchester, Rock-  
53 land, Nassau and Suffolk; and region three shall contain any county not  
54 contained in regions one and two. Such credit shall be allocated by the  
55 empire state development corporation among taxpayers in order of priori-  
56 ty based upon the date of filing an application for allocation of

1 digital gaming media production credit with such office. If the total  
2 amount of allocated credits applied for in any particular year exceeds  
3 the aggregate amount of tax credits allowed for such year under this  
4 section, such excess shall be treated as having been applied for on the  
5 first day of the subsequent taxable year.

6 (c) Definitions. As used in this section:

7 (1) "Qualified digital gaming media production" means: (i) a website,  
8 the digital media production costs of which are paid or incurred predo-  
9 minately in connection with (A) video simulation, animation, text,  
10 audio, graphics or similar gaming related property embodied in digital  
11 format, and (B) interactive features of digital gaming (e.g., links,  
12 message boards, communities or content manipulation); (ii) video or  
13 interactive games produced primarily for distribution over the internet,  
14 wireless network or successors thereto; (iii) animation, simulation or  
15 embedded graphics digital gaming related software intended for commer-  
16 cial distribution regardless of medium; and (iv) a digital gaming media  
17 production in which qualified digital gaming media production costs  
18 equal to or are in excess of seven thousand five hundred dollars if  
19 incurred and paid in this state in twelve months preceding the date on  
20 which the credit is claimed. Provided, however, if such a production  
21 costs are incurred and paid outside the metropolitan commuter transpor-  
22 tation district in this state, such production costs shall be equal to  
23 or in excess of three thousand seven hundred fifty dollars to be a qual-  
24 ified digital gaming media production for purposes of this paragraph. A  
25 qualified digital gaming media production does not include a website,  
26 video, interactive game or software that is used predominately for:  
27 electronic commerce (retail or wholesale purposes other than the sale of  
28 video or interactive games), gambling (including activities regulated by  
29 a New York gaming agency), exclusive local consumption for entities not  
30 accessible by the general public including industrial or other private  
31 purposes, and political advocacy purposes.

32 (2) "Digital gaming media production costs" means any costs for prop-  
33 erty used and wages or salaries paid to individuals directly employed  
34 for services performed by those individuals directly and predominately  
35 in the creation of a digital gaming media production or productions.  
36 Digital gaming media production costs include but shall not be limited  
37 to to payments for property used and services performed directly and  
38 predominately in the development (including concept creation), design,  
39 production (including concept creation), design, production (including  
40 testing), editing (including encoding) and compositing (including the  
41 integration of digital files for interaction by end users) of digital  
42 gaming media. Digital gaming media production costs shall not include  
43 expenses incurred for the distribution, marketing, promotion, or adver-  
44 tising content generated by end-users or other costs not directly and  
45 predominately related to the creation, production or modification of  
46 digital gaming media. In addition, salaries or other income distribution  
47 related to the creation of digital gaming media for any person who  
48 serves in the role of chief executive officer, chief financial officer,  
49 president, treasurer or similar position shall not be included as  
50 digital gaming media production costs. Furthermore, any income or other  
51 distribution to any individual who holds an ownership interest in a  
52 digital gaming media production entity shall not be included as digital  
53 gaming media production costs.

54 (3) "Qualified digital gaming media production costs" means digital  
55 gaming media production costs only to the extent such costs are attrib-  
56 utable to the use of property or the performance of services by any

persons within the state directly and predominantly in the creation, production or modification of digital gaming related media. Such total production costs incurred and paid in this state shall be equal to or exceed seventy-five percent of total cost of an eligible production incurred and paid within and without this state.

(d) Cross-references. For application of the credit provided for in this section, see the following provisions of this chapter:

(1) Article nine-A: section two hundred ten-B, subdivision fifty-four.

(2) Article twenty-two: section six hundred six, subsection (i), paragraph one, subparagraph (B), clause (xlv).

(3) Article twenty-two: section six hundred six, subsection (jjj).

§ 6. Section 210-B of the tax law is amended by adding a new subdivision 54 to read as follows:

54. Empire state digital gaming media production credit. (a) Allowance of credit. A taxpayer who is eligible pursuant to section forty-five of this chapter shall be allowed a credit to be computed as provided in such section forty-five against the tax imposed by this article.

(b) Application of credit. The credit allowed under this subdivision for any taxable year shall not reduce the tax due for such year to less than the amount prescribed in paragraph (d) of subdivision one of section two hundred ten of this article. Provided, however, that if the amount of the credit allowable under this subdivision for any taxable year reduces the tax to such amount, the excess shall be treated as an overpayment of tax to be credited or refunded in accordance with the provisions of section one thousand eighty-six of this chapter, provided, however, no interest shall be paid thereon.

§ 7. Subparagraph (B) of paragraph 1 of subsection (i) of section 606 of the tax law is amended by adding a new clause (xlv) to read as follows:

<u>(xlv) Empire state digital</u>	<u>Amount of credit</u>
<u>gaming media production</u>	<u>under subdivision</u>
<u>credit under subsection (jjj)</u>	<u>fifty-four of section</u>
	<u>two hundred ten-B</u>

§ 8. Section 606 of the tax law is amended by adding a new subsection (jjj) to read as follows:

(jjj) Empire state digital gaming media production credit. (1) Allowance of credit. A taxpayer who is eligible pursuant to section forty-five of this chapter shall be allowed a credit to be computed as provided in such section forty-five against the tax imposed by this article.

(2) Application of credit. If the amount of the credit allowable under this subsection for any taxable year exceeds the taxpayer's tax for such year, the excess shall be treated as an overpayment of tax to be credited or refunded as provided in section six hundred eighty-six of this article, provided, however, that no interest shall be paid thereon.

§ 9. The state commissioner of economic development, after consulting with the state commissioner of taxation and finance, shall promulgate regulations by December 31, 2017 to establish procedures for the allocation of tax credits as required by subdivision (a) of section 44 and subdivision (a) of section 45 of the tax law. Such rules and regulations shall include provisions describing the application process, the due dates for such applications, the standards which shall be used to evaluate the applications, the documentation that will be provided to taxpayers substantiate to the New York state department of taxation and finance the amount of tax credits allocated to such taxpayers, under

1 what conditions all or a portion of this tax credit may be revoked, and  
2 such other provisions as deemed necessary and appropriate. Notwithstand-  
3 ing any other provisions to the contrary in the state administrative  
4 procedure act, such rules and regulations may be adopted on an emergency  
5 basis if necessary to meet such December 31, 2017 deadline.

6 § 10. Subdivision 13 of section 352 of the economic development law is  
7 REPEALED.

8 § 11. Subdivisions 1, 3 and 5 of section 353 of the economic develop-  
9 ment law, subdivisions 1 and 3 as amended by section 2 of part K of  
10 chapter 59 of the laws of 2017, subdivision 3 as separately amended by  
11 section 2 of part ZZ of chapter 59 of the laws of 2017 and subdivision 5  
12 as amended by section 2 of part K of chapter 59 of the laws of 2015, are  
13 amended to read as follows:

14 1. To be a participant in the excelsior jobs program, a business enti-  
15 ty shall operate in New York state predominantly:

16 (a) as a financial services data center or a financial services back  
17 office operation;

18 (b) in manufacturing;

19 (c) in software development and new media;

20 (d) in scientific research and development;

21 (e) in agriculture;

22 (f) in the creation or expansion of back office operations in the  
23 state;

24 (g) in a distribution center;

25 (h) in an industry with significant potential for private-sector  
26 economic growth and development in this state as established by the  
27 commissioner in regulations promulgated pursuant to this article. In  
28 promulgating such regulations the commissioner shall include job and  
29 investment criteria;

30 (i) as an entertainment company; or

31 (j) [~~in music production, or~~

32 ~~(k)] as a life sciences company.~~

33 3. For the purposes of this article, in order to participate in the  
34 excelsior jobs program, a business entity operating predominantly in  
35 manufacturing must create at least five net new jobs; a business entity  
36 operating predominately in agriculture must create at least five net new  
37 jobs; a business entity operating predominantly as a financial service  
38 data center or financial services customer back office operation must  
39 create at least twenty-five net new jobs; a business entity operating  
40 predominantly in scientific research and development must create at  
41 least five net new jobs; a business entity operating predominantly in  
42 software development must create at least five net new jobs; a business  
43 entity creating or expanding back office operations must create at least  
44 twenty-five net new jobs; [~~a business entity operating predominately in~~  
45 ~~music production must create at least five net new jobs,~~] a business  
46 entity operating predominantly as an entertainment company must create  
47 or obtain at least one hundred net new jobs; or a business entity oper-  
48 ating predominantly as a distribution center in the state must create at  
49 least fifty net new jobs, notwithstanding subdivision five of this  
50 section; or a business entity operating predominately as a life sciences  
51 company must create at least five net new jobs; or a business entity  
52 must be a regionally significant project as defined in this article; or

53 5. A not-for-profit business entity, a business entity whose primary  
54 function is the provision of services including personal services, busi-  
55 ness services, or the provision of utilities, and a business entity  
56 engaged predominantly in the retail or entertainment industry, other

1 than a business operating as an entertainment company as defined in this  
2 article [~~and other than a business entity engaged in music production~~],  
3 and a company engaged in the generation or distribution of electricity,  
4 the distribution of natural gas, or the production of steam associated  
5 with the generation of electricity are not eligible to receive the tax  
6 credit described in this article.

7 § 12. Subdivision 23 of section 352 of the economic development law,  
8 as amended by section 1 of part K of chapter 59 of the laws of 2017, is  
9 amended to read as follows:

10 23. "Software development" means the creation of coded computer  
11 instructions [~~or production or post-production of video games, as~~  
12 ~~defined in subdivision one-a of section six hundred eleven of the gener-~~  
13 ~~al business law, other than those embedded and used exclusively in~~  
14 ~~advertising, promotional websites or microsites,~~] and [also] includes  
15 new media as defined by the commissioner in regulations.

16 § 13. The economic development law is amended by adding a new section  
17 243 to read as follows:

18 § 243. Reports on the music and digital gaming industries in New York.  
19 1. The empire state development corporation shall file a report on a  
20 biannual basis with the director of the division of the budget and the  
21 chairpersons of the assembly ways and means committee and senate finance  
22 committee. The report shall be filed no later than thirty days before  
23 the mid-point and the end of the state fiscal year. The first report  
24 shall cover the calendar half year that begins on January first, two  
25 thousand nineteen. Each report must contain the following information  
26 for the covered calendar half year:

27 (a) the total dollar amount of credits allocated pursuant to sections  
28 forty-four and forty-five of the tax law during the half year, broken  
29 down by month;

30 (b) the number of music and digital gaming projects, which have been  
31 allocated tax credits of less than one million dollars per project, and  
32 the total dollar amount of credits allocated to those projects distrib-  
33 uted by region pursuant to subdivision (b) of sections forty-four and  
34 forty-five of the tax law;

35 (c) the number of music and digital gaming projects, which have been  
36 allocated tax credits of more than one million dollars, and the total  
37 dollar amount of credits allocated to those projects distributed by  
38 region pursuant to subdivision (b) of sections forty-four and forty-five  
39 of the tax law;

40 (d) a list of each eligible music and digital gaming project, which  
41 has been allocated a tax credit enumerated by region pursuant to subdivi-  
42 vision (b) of sections forty-four and forty-five of the tax law, and for  
43 each of those projects, (i) the estimated number of employees associated  
44 with the project, (ii) the estimated qualifying costs for the projects,  
45 (iii) the estimated total costs of the project, (iv) the credit eligible  
46 employee hours for each project, and (v) total wages for such credit  
47 eligible employee hours for each project; and

48 (e) (i) the name of each taxpayer allocated a tax credit for each  
49 project and the county of residence or incorporation of such taxpayer  
50 or, if the taxpayer does not reside or is not incorporated in New York,  
51 the state of residence or incorporation; however, if the taxpayer claims  
52 a tax credit because the taxpayer is a member of a limited liability  
53 company, a partner in a partnership or a shareholder in a subchapter S  
54 corporation, the name of each limited liability company, partnership or  
55 subchapter S corporation earning any of those tax credits must be  
56 included in the report instead of information about the taxpayer claim-

1 ing the tax credit, (ii) the amount of tax credit allocated to each  
2 taxpayer; provided however, if the taxpayer claims a tax credit because  
3 the taxpayer is a member of a limited liability company, a partner in a  
4 partnership or a shareholder in a subchapter S corporation, the amount  
5 of tax credit earned by each entity must be included in the report  
6 instead of information about the taxpayer claiming the tax credit, and  
7 (iii) information identifying the project associated with each taxpayer  
8 for which a tax credit was claimed under section forty-four or forty-  
9 five of the tax law.

10 2. The empire state development corporation shall file a report on a  
11 triennial basis with the director of the division of the budget and the  
12 chairpersons of the assembly ways and means committee and senate finance  
13 committee. The first report shall be filed no later than March first,  
14 two thousand twenty-one. The report must be prepared by an independent  
15 third party auditor and include: (a) information regarding the empire  
16 state music production credit and the empire state digital gaming  
17 production credit programs including the efficiency of operations, reli-  
18 ability of financial reporting, compliance with laws and regulations and  
19 distribution of assets and funds; (b) and economic impact study prepared  
20 by an independent third party of the program with special emphasis on  
21 the regional impact by region and the total dollar amount of credits  
22 allocated to those projects distributed by region pursuant to subdivi-  
23 sion (b) of sections forty-four and forty-five of the tax law; and (c)  
24 any other information or statistical information that the commissioner  
25 of economic development deems to be useful in analyzing the effects of  
26 the programs.

27 § 14. This act shall take effect immediately and shall apply to taxa-  
28 ble years beginning on January 1, 2018 and before January 1, 2023;  
29 provided that sections one through eight of this act shall expire and be  
30 deemed repealed December 31, 2022.