STATE OF NEW YORK

2172

2017-2018 Regular Sessions

IN ASSEMBLY

January 17, 2017

Introduced by M. of A. SCHIMMINGER, MAGNARELLI -- read once and referred to the Committee on Ways and Means

AN ACT to amend the tax law, in relation to providing for direct private assistance to emerging technology companies through the trading of their existing but unused research and development credits and their existing but unused net operating loss deductions to existing corporations and partnerships in return for private assistance

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

Section 1. Short title. This act shall be known and may be cited as the "Small New York Based High-Technology Business Investment Tax Credit Act".

§ 2. The tax law is amended by adding a new section 212 to read as follows:

§ 212. Corporation business tax benefit certificate transfer program. 1. (a) The department shall establish a corporation business tax benefit certificate transfer program to allow new or expanding emerging technology and biotechnology companies in this state having unused amounts of research and development tax credits otherwise allowable pursuant to subparagraph (i) of paragraph (b) of subdivision one of section two hundred ten-B of this article, which cannot be applied for the credit's tax year, and unused net operating loss carryovers pursuant to section two hundred eight of this article to surrender those tax benefits for use by other corporations established under the business corporation law and subject to the provisions of this article in exchange for private financial assistance to be provided those taxpayers or expanding emerging technology and biotechnology companies. Such taxpayers shall be provided with a corporation business tax benefit certificate to be developed by the commissioner.

(b) The commissioner, in cooperation with the commissioner of economic development, shall review and approve applications by new or expanding

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

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emerging technology and biotechnology companies in this state having unused but otherwise allowable carryovers of research and development tax credits and otherwise allowable net operating loss carryovers pursuant to subparagraph (i) of paragraph (b) of subdivision one of section two hundred ten-B of this article and section two hundred eight, respectively, to surrender those tax benefits in exchange for private financial assistance to be made to a corporation filing pursuant to this article, which has obtained a corporation business tax benefit certificate in an amount equal to at least seventy-five percent of the amount of the surrendered tax benefits.

(c) The commissioner shall calculate the value of the net operating loss carryover for purposes of the benefit certificate equal to the amount of the carryover times the applicable business allocation percentage and tax rate of the emerging technology or biotechnology company.

(d) The commissioner, in cooperation with the commissioner of economic development, shall review and approve applications by taxpayers pursuant to the provisions of this article to acquire surrendered tax benefits approved pursuant to paragraph (b) of this subdivision, which shall be issued in the form of corporation business tax benefit transfer certificates, in exchange for private financial assistance to be made by the taxpayer in an amount equal to at least seventy-five percent of the amount of the surrendered tax benefit of an emerging technology or biotechnology company in the state. The private financial assistance shall assist in funding expenses incurred in connection with the operation of a new or expanding emerging technology or biotechnology company in the state, including but not limited to the expenses of fixed assets, such as the construction and acquisition and development of real estate, materials, start-up, tenant fit-out, working capital, salaries, research, and development expenditures.

(e) The commissioner shall coordinate the applications, in conjunction with the department of economic development, for surrender and acquisition of unused but otherwise allowable tax benefits pursuant to this section in a manner that can best stimulate and encourage the extension of private financial assistance to new and expanding emerging technology and biotechnology companies in this state into a written agreement with such company concerning the terms and conditions of the private financial assistance made in exchange for the certificate. The written agreement may contain terms concerning the maintenance by the new or expanding emerging technology or biotechnology company of a headquarters or a base of operation in this state.

2. (a) A taxpayer that has acquired a corporation business tax benefit certificate pursuant to the provisions of paragraph (b) of this subdivision that includes the right to a net operating loss carryover deduction shall attach that certificate to any return the taxpayer is required to file and shall otherwise apply the net operating loss carryover deduction as evidenced by the certificate according to the provisions of paragraph (b) of subdivision one of this section and any rules or regulations the commissioner may adopt to carry out the provisions of this section.

(b) A new or expanding emerging technology or biotechnology company that has surrendered an unused net operating loss carryover pursuant to the provisions of section two hundred eight of this article shall not be allowed a net operating loss carryover deduction based upon the right to such a deduction, as evidenced by such corporation business tax benefit

certificate, and shall attach a copy of the certificate to any return the taxpayer is required to file.

3. (a) A taxpayer that has acquired a corporation business tax benefit certificate pursuant to subdivision one of this section that includes the right to a research and development tax credit carryover pursuant to subparagraph (i) of paragraph (b) of subdivision one of section two hundred ten-B of this article shall attach that certificate to any return the taxpayer is required to file and shall otherwise apply the credit carryover, as evidenced by the certificate, according to the provisions of paragraph (b) of subdivision one of this section and any rules or regulations the commissioner may adopt to carry out the provisions of this section.

(b) A new or expanding technology or biotechnology company that has surrendered an unused research and development tax credit carryover shall not be allowed a research and development tax credit carryover based upon the right to such a credit carryover, as evidenced by the corporation business tax benefit certificate, and shall attach a copy of the certificate to any return the taxpayer is required to file.

4. For the purposes of this section, the following terms have the following meanings:

(a) "Advanced computing" means a technology used in the designing and developing of computing hardware and software, including innovations in designing the full spectrum of hardware from hand-held calculators to super computers, and peripheral equipment.

(b) "Advanced materials" means materials with engineered properties created through the development of specialized processing and synthesis technology, including ceramics, high value-added metals, electronic materials, composites, polymers, and biomaterials.

(c) "Biotechnology" means the continually expanding body of fundamental knowledge about the function of biological systems from the macro level to the molecular and subatomic levels, as well as novel products, services, technologies, and sub-technologies developed as a result of insights gained from research advances which add to that body of fundamental knowledge.

(d) "Control", with respect to a corporation, means ownership, directly or indirectly, of stock possessing eighty percent or more of the total combined voting power of all classes of the stock of the corporation entitled to vote; and "control", with respect to a trust, means ownership, directly or indirectly, of eighty percent or more of the beneficial interest in the principal or income of the trust. The ownership of stock in a corporation, of a capital or profits interest in a partnership or association, or of a beneficial interest in a trust shall be determined in accordance with the rules for constructive ownership of stock provided in subsection (c) of section 267 of the federal Internal Revenue Code of 1986, 26 U.S.C. §267, other than paragraph (3) of subsection (c) of such section.

(e) "Controlled group" means one or more chains of corporations connected through stock ownership with a common parent corporation if stock possessing at least eighty percent of the voting power of all classes of stock of each of the corporations is owned directly or indirectly by one or more of the corporations and the common parent owns directly stock possessing at least eighty percent of the voting power of all classes of stock of at least one of the other corporations.

(f) "Electronic device technology" means a technology involving microelectronics, semiconductors, electronic equipment, and instrumentation, radio frequency, microwave, and millimeter electronics, and optical and

optic-electrical devices, or data and digital communications and imaging devices.

(g) "Environmental technology" means assessment and prevention of threats or damage to human health or the environment, environmental cleanup, or the development of alternative energy sources.

(h) "Medical device technology" means a technology involving any medical equipment or product (other than a pharmaceutical product) that has therapeutic value, diagnostic value, or both, and is regulated by the federal Food and Drug Administration.

(i) "Partnership" means a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, and which is not a trust or estate, a corporation, or a sole proprietorship.

(j) "Pilot scale manufacturing" means design, construction, and testing of preproduction prototypes and models in the fields of advanced computing, advanced materials, biotechnology, electronic device technology, environmental technology, and medical device technology, other than for commercial sale, excluding sales of prototypes or sales for market testing, if total gross receipts from such sales of the product, service, or process do not exceed one million dollars.

(k) "Qualified investment" means the non-refundable investment at risk in a small New York-based high technology business by a taxpayer that is not a related person of the small New York based high-technology business, the transfer of which is in connection with a transaction in exchange for stock, interest in partnerships or joint ventures, licenses (exclusive or non-exclusive), right to use technology, marketing rights, warrants, options, or any item similar to those included in this paragraph, including but not limited to options or rights to acquire any of the items included in this paragraph.

(l) "Qualified research expenses" means qualified research expenses, as defined in section 41 of the federal Internal Revenue Code of 1986, 26 U.S.C. § 41, as in effect on June thirtieth, nineteen hundred ninety-two, in the fields of environmental technology or medical device technology.

(m) "Related person" means:

(1) a corporation, partnership, association, or trust by the taxpayer;

(2) an individual, corporation, partnership, association, or trust that is in the control of the taxpayer;

(3) a corporation, partnership, association, or trust controlled by an individual, corporation, partnership, association, or trust that is in the control of the taxpayer; or

(4) a member of the same controlled group as a taxpayer.

(n) "Small New York based high-technology business" means a corporation doing business employing or owning capital or property, or maintaining an office, in this state that has qualified research expenses paid or incurred for research conducted in this state or conducts pilot scale manufacturing in this state, and has fewer than two hundred twenty-five employees, of whom seventy-five percent are New York-based employees filling a position or job in this state.

(o) "Tax year" means the fiscal or calendar accounting year of a taxpayer.

§ 3. The tax law is amended by adding a new section 606-a to read as follows:

§ 606-a. Noncorporation tax benefit certificate transfer program. (a) (1) The department shall establish a corporation business tax benefit certificate transfer program to allow new or expanding emerging technol-

ogy and biotechnology companies in this state having unused amounts of research and development tax credits otherwise allowable pursuant to subparagraph (A) of paragraph two of subsection (a) of section six hundred six of this article, which cannot be applied for the credit's tax year, and unused net operating loss carryover pursuant to subsection (b) of section six hundred seventeen and subsection (b) of section six hundred thirty-three of this article to surrender such tax benefits for use by other entities subject to the provisions of this article in exchange for private financial assistance to be provided such taxpayers or expanding emerging technology and biotechnology companies. Such taxpayers shall be provided with a noncorporation business tax benefit certificate to be developed by the commissioner.

(2) The commissioner, in cooperation with the commissioner of the department of economic development, shall review and approve applications by new or expanding technology and biotechnology companies in this state having unused but otherwise allowable carryover of research and development tax credits and otherwise allowable net operating loss carryovers pursuant to either subparagraph (A) of paragraph two of subsection (a) of section six hundred six or subsection (b) of section six hundred seventeen or subsection (b) of section six hundred thirty-three of this article, respectively, to surrender those tax benefits in exchange for private financial assistance to be made to a taxpayer filing pursuant to this article who has obtained a noncorporation business tax benefit certificate in an amount equal to at least seventy-five percent of the amount of the surrendered tax benefits.

(3) The commissioner shall calculate the value of the net operating loss carryover for purposes of the benefit certificate equal to the amount of the carryover times the applicable business allocation percentage and tax rate of the emerging technology or biotechnology company.

(4) The commissioner, in cooperation with the commissioner of the department of economic development, shall review and approve applications by taxpayers subject to the provisions of this article to acquire surrendered tax benefits approved pursuant to paragraph two of this subsection, which shall be issued in the form of noncorporation business tax benefit transfer certificates, in exchange for private financial assistance to be made by the taxpayer in an amount equal to at least seventy-five percent of the amount of the surrendered tax benefit of an emerging technology or biotechnology company in the state. The private financial assistance shall assist in funding expenses incurred in connection with the operation of a new or expanding emerging technology or biotechnology company in the state, including but not limited to the expenses of fixed assets, such as the construction and acquisition and development of real estate, materials, start-up, tenant fit-out, working capital, salaries, research, and development expenditures.

(5) The commissioner shall coordinate the applications, in conjunction with the department of economic development, for surrender and acquisition of unused but otherwise allowable tax benefits pursuant to this section in a manner that can best stimulate and encourage the extension of private financial assistance to new and expanding emerging technology and biotechnology companies in this state into a written agreement with such company concerning the terms and conditions of the private financial assistance made in exchange for the certificate. The written agreement may contain terms concerning the maintenance by the new or expanding emerging technology or biotechnology company of a headquarters or a base of operation in this state.

(b)(1) A taxpayer that has acquired a noncorporation business tax benefit certificate pursuant to the provisions of paragraph two of subsection (a) of this section that includes the right to a net operating loss carryover deduction shall attach that certificate to any return the taxpayer is required to file and shall otherwise apply the net operating loss carryover deduction, as evidenced by the certificate, according to the provisions of paragraph two of subsection (a) of this section and any rules or regulations the commissioner may adopt to carry out the provisions of this section.

(2) A new or expanding emerging technology or biotechnology company that has surrendered an unused net operating loss carryover pursuant to the provisions of subsection (b) of section six hundred seventeen and subsection (b) of section six hundred thirty-three of this article shall not be allowed a net operating loss carryover deduction based upon the right to such a deduction, as evidenced by such noncorporation business tax benefit certificate, and shall attach a copy of the certificate to any return the taxpayer is required to file.

(c) (1) A taxpayer that has acquired a noncorporation business tax benefit certificate pursuant to subsection (a) of this section that includes the right to a research and development tax credit carryover shall attach that certificate to any return the taxpayer is required to file and shall otherwise apply the credit carryover, as evidenced by the certificate, according to the provisions of paragraph two of subsection (a) of this section and any rules or regulations the commissioner may adopt to carry out the provisions of this section.

(2) A new or expanding emerging technology or biotechnology company that has surrendered an unused research and development tax credit carryover shall not be allowed a research and development tax credit carryover based upon the right to such a credit carryover, as evidenced by the noncorporation business tax benefit certificate, and shall attach a copy of the certificate to any return the taxpayer is required to file.

(d) For the purposes of this section, the following terms shall have the following meanings:

(1) "Advanced computing" means a technology used in designing and developing computing hardware and software, including innovations in designing the full spectrum of hardware from hand-held calculators to super computers, and peripheral equipment.

(2) "Advanced materials" means materials with engineered properties created through the development of specialized processing and synthesis technology, including ceramics, high value-added metals, electronic materials, composites, polymers, and biomaterials.

(3) "Biotechnology" means the continually expanding body of fundamental knowledge about the function of biological systems from the macro level to the molecular and subatomic levels, as well as novel products, services, technologies, and sub-technologies developed as a result of insights gained from research advances which add to that body of fundamental knowledge.

(4) "Control", with respect to a corporation, means ownership, directly or indirectly, of stock possessing eighty percent or more of the total combined voting power of all classes of the stock of the corporation entitled to vote; and "control", with respect to a trust, means ownership, directly or indirectly, of eighty percent or more of the beneficial interest in the principal or income of the trust. The ownership of stock in a corporation, of a capital or profits interest in a partnership or association, or of a beneficial interest in a trust shall

be determined in accordance with the rules for constructive ownership of stock provided in subsection (c) of section 267 of the federal Internal Revenue Code of 1986, 26 U.S.C. § 267, other than paragraph (3) of subsection (c) of such section.

(5) "Controlled group" means one or more chains of corporations connected through stock ownership with a common parent corporation if stock possessing at least eighty percent of the voting power of all classes of stock of each of the corporations is owned directly or indirectly by one or more of the corporations and the common parent owns directly stock possessing at least eighty percent of the voting power of all classes of stock of at least one of the other corporations.

(6) "Electronic device technology" means a technology involving microelectronics, semiconductors, electronic equipment, and instrumentation, radio frequency, microwave, and millimeter electronics, and optical and optic-electrical devices, or data and digital communications and imaging devices.

(7) "Environmental technology" means assessment and prevention of threats or damage to human health or the environment, environmental cleanup, or the development of alternative energy sources.

(8) "Medical device technology" means a technology involving any medical equipment or product (other than a pharmaceutical product) that has therapeutic value, diagnostic value, or both, and is regulated by the federal Food and Drug Administration.

(9) "Partnership" means a syndicate, group, pool, joint venture or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, and which is not a trust or estate, a corporation, or a sole proprietorship.

(10) "Pilot scale manufacturing" means design, construction, and testing of preproduction prototypes and models in the fields of advanced computing, advanced materials, biotechnology, electronic device technology, environmental technology, and medical device technology, other than for commercial sale, excluding sales of prototypes or sales for market testing, if total gross receipts from such sales of the product, service, or process do not exceed one million dollars.

(11) "Qualified investment" means the non-refundable investment at risk in a small New York-based high technology business by a taxpayer that is not a related person of the small New York based high-technology business, the transfer of which is in connection with a transaction in exchange for stock, interest in partnerships or joint ventures, licenses (exclusive or non-exclusive), rights to use technology, marketing rights, warrants, options, or rights to acquire any of the items similar to those included in this paragraph, including but not limited to options or rights to acquire any of the items included in this paragraph.

(12) "Qualified research expenses" means qualified research expenses, as defined in section 41 of the federal Internal Revenue Code of 1986, 26 U.S.C. § 41, as in effect on June thirtieth, nineteen hundred ninety-two, in the fields of environmental technology or medical device technology.

(13) "Related person" means:

(A) a corporation, partnership, association, or trust by the taxpayer;

(B) an individual, corporation, partnership, association, or trust that is in the control of the taxpayer;

(C) a corporation, partnership, association, or trust controlled by an individual, corporation, partnership, association, or trust that is in the control of the taxpayer; or

(D) a member of the same controlled group as the taxpayer.

(14) "Small New York based high-technology business" means a corporation doing business employing or owning capital or property, or maintaining an office, in this state that has qualified research expenses paid or incurred for research conducted in this state or conducts pilot scale manufacturing in this state, and has fewer than two hundred twenty-five employees, of whom seventy-five percent are New York-based employees filling a position or job in this state.

(15) "Tax year" means the fiscal or calendar accounting year of a taxpayer.

§ 4. This act shall take effect immediately and shall apply to taxable years which commence on or after January 1, 2018.