

# STATE OF NEW YORK

5887--A

2017-2018 Regular Sessions

## IN SENATE

May 4, 2017

Introduced by Sens. GOLDEN, BRESLIN -- read twice and ordered printed, and when printed to be committed to the Committee on Investigations and Government Operations -- recommitted to the Committee on Investigations and Government Operations in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, 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 digital gaming media production credit; 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 digital gaming media production credit. (a) Allowance of credit. (1) A taxpayer which is a digital gaming media production entity engaged in qualified digital gaming media production, or who is a sole proprietor of or a member of a partnership, which is a digital gaming media production entity engaged in qualified digital gaming media 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 digital gaming media productions.

(3) Eligible digital gaming media production costs for a qualified digital gaming media production incurred and paid in this state but outside such metropolitan commuter transportation district shall be eligible for a credit of ten percent of such eligible production costs

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

LBD11396-03-8

1 in addition to the credit specified in paragraph two of this subdivi-  
2 sion.

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

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

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

36 (1) "Qualified digital gaming media production" means: (i) a website,  
37 the digital media production costs of which are paid or incurred predom-  
38 inately in connection with (A) video simulation, animation, text,  
39 audio, graphics or similar gaming related property embodied in digital  
40 format, and (B) interactive features of digital gaming (e.g., links,  
41 message boards, communities or content manipulation); (ii) video or  
42 interactive games produced primarily for distribution over the internet,  
43 wireless network or successors thereto; (iii) animation, simulation or  
44 embedded graphics digital gaming related software intended for commer-  
45 cial distribution regardless of medium; and (iv) a digital gaming media  
46 production in which qualified digital gaming media production costs  
47 equal to or are in excess of seven thousand five hundred dollars if  
48 incurred and paid in this state in twelve months preceding the date on  
49 which the credit is claimed. Provided, however, if such a production  
50 costs are incurred and paid outside the metropolitan commuter transpor-  
51 tation district in this state, such production costs shall be equal to  
52 or in excess of three thousand seven hundred fifty dollars to be a qual-  
53 ified digital gaming media production for purposes of this paragraph. A  
54 qualified digital gaming media production does not include a website,  
55 video, interactive game or software that is used predominately for:  
56 electronic commerce (retail or wholesale purposes other than the sale of

1 video or interactive games), gambling (including activities regulated by  
2 a New York gaming agency), exclusive local consumption for entities not  
3 accessible by the general public including industrial or other private  
4 purposes, and political advocacy purposes.

5 (2) "Digital gaming media production costs" means any costs for prop-  
6 erty used and wages or salaries paid to individuals directly employed  
7 for services performed by those individuals directly and predominantly  
8 in the creation of a digital gaming media production or productions.  
9 Digital gaming media production costs include but shall not be limited  
10 to to payments for property used and services performed directly and  
11 predominantly in the development (including concept creation), design,  
12 production (including concept creation), design, production (including  
13 testing), editing (including encoding) and compositing (including the  
14 integration of digital files for interaction by end users) of digital  
15 gaming media. Digital gaming media production costs shall not include  
16 expenses incurred for the distribution, marketing, promotion, or adver-  
17 tising content generated by end-users or other costs not directly and  
18 predominantly related to the creation, production or modification of  
19 digital gaming media. In addition, salaries or other income distribution  
20 related to the creation of digital gaming media for any person who  
21 serves in the role of chief executive officer, chief financial officer,  
22 president, treasurer or similar position shall not be included as  
23 digital gaming media production costs. Furthermore, any income or other  
24 distribution to any individual who holds an ownership interest in a  
25 digital gaming media production entity shall not be included as digital  
26 gaming media production costs.

27 (3) "Qualified digital gaming media production costs" means digital  
28 gaming media production costs only to the extent such costs are attrib-  
29 utable to the use of property or the performance of services by any  
30 persons within the state directly and predominantly in the creation,  
31 production or modification of digital gaming related media. Such total  
32 production costs incurred and paid in this state shall be equal to or  
33 exceed seventy-five percent of total cost of an eligible production  
34 incurred and paid within and without this state.

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

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

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

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

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

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

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

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

<u>(xliv) 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-three of section</u>
	<u>two hundred ten-B</u>

§ 4. 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-four of this chapter shall be allowed a credit to be computed as provided in such section forty-four 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.

§ 5. The state commissioner of economic development, after consulting with the state commissioner of taxation and finance, shall promulgate regulations by December 31, 2018 to establish procedures for the allocation of tax credits as required by subdivision (a) of section 44 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 what conditions all or a portion of this tax credit may be revoked, and such other provisions as deemed necessary and appropriate. Notwithstanding any other provisions to the contrary in the state administrative procedure act, such rules and regulations may be adopted on an emergency basis if necessary to meet such December 31, 2018 deadline.

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

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

§ 7. The economic development law is amended by adding a new section 242 to read as follows:

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

1 (a) the total dollar amount of credits allocated pursuant to section  
2 forty-four of the tax law during the half year, broken down by month;

3 (b) the number of digital gaming projects, which have been allocated  
4 tax credits of less than one million dollars per project, and the total  
5 dollar amount of credits allocated to those projects distributed by  
6 region pursuant to subdivision (b) of section forty-four of the tax law;

7 (c) the number of digital gaming projects, which have been allocated  
8 tax credits of more than one million dollars, and the total dollar  
9 amount of credits allocated to those projects distributed by region  
10 pursuant to subdivision (b) of section forty-four of the tax law;

11 (d) a list of each eligible digital gaming project, which has been  
12 allocated a tax credit enumerated by region pursuant to subdivision (b)  
13 of section forty-four of the tax law, and for each of those projects,  
14 (i) the estimated number of employees associated with the project, (ii)  
15 the estimated qualifying costs for the projects, (iii) the estimated  
16 total costs of the project, (iv) the credit eligible employee hours for  
17 each project, and (v) total wages for such credit eligible employee  
18 hours for each project; and

19 (e) (i) the name of each taxpayer allocated a tax credit for each  
20 project and the county of residence or incorporation of such taxpayer  
21 or, if the taxpayer does not reside or is not incorporated in New York,  
22 the state of residence or incorporation; however, if the taxpayer claims  
23 a tax credit because the taxpayer is a member of a limited liability  
24 company, a partner in a partnership or a shareholder in a subchapter S  
25 corporation, the name of each limited liability company, partnership or  
26 subchapter S corporation earning any of those tax credits must be  
27 included in the report instead of information about the taxpayer claim-  
28 ing the tax credit, (ii) the amount of tax credit allocated to each  
29 taxpayer; provided however, if the taxpayer claims a tax credit because  
30 the taxpayer is a member of a limited liability company, a partner in a  
31 partnership or a shareholder in a subchapter S corporation, the amount  
32 of tax credit earned by each entity must be included in the report  
33 instead of information about the taxpayer claiming the tax credit, and  
34 (iii) information identifying the project associated with each taxpayer  
35 for which a tax credit was claimed under section forty-four of the tax  
36 law.

37 2. The empire state development corporation shall file a report on a  
38 triennial basis with the director of the division of the budget and the  
39 chairpersons of the assembly ways and means committee and senate finance  
40 committee. The first report shall be filed no later than March first,  
41 two thousand twenty-one. The report must be prepared by an independent  
42 third party auditor and include: (a) information regarding the empire  
43 state digital gaming production credit program including the efficiency  
44 of operations, reliability of financial reporting, compliance with laws  
45 and regulations and distribution of assets and funds; (b) an economic  
46 impact study prepared by an independent third party of the program with  
47 special emphasis on the regional impact by region and the total dollar  
48 amount of credits allocated to those projects distributed by region  
49 pursuant to subdivision (b) of section forty-four of the tax law; and  
50 (c) any other information or statistical information that the commis-  
51 sioner of economic development deems to be useful in analyzing the  
52 effects of the programs.

53 § 8. This act shall take effect immediately and shall apply to taxable  
54 years beginning on January 1, 2019 and before January 1, 2025; provided  
55 that sections one through four of this act shall expire and be deemed  
56 repealed December 31, 2023.