STATE OF NEW YORK

6518

2019-2020 Regular Sessions

IN ASSEMBLY

March 8, 2019

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

AN ACT to amend the tax law, in relation to the empire state commercial production credit

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

Section 1. Section 28 of the tax law, as added by section 2 of part V of chapter 62 of the laws of 2006, paragraph 1 of subdivision (a) as amended by chapter 518 of the laws of 2018, paragraph 2 of subdivision (a) as amended by chapter 300 of the laws of 2007, subparagraph (i) of paragraph 2 of subdivision (a) as amended by section 2 of part I of chapter 59 of the laws of 2012, subparagraph (iii) of paragraph 2 of subdivision (a) as amended by section 2 of part O of chapter 59 of the laws of 2014, paragraph 3 of subdivision (a) as amended by section 45 of part A of chapter 59 of the laws of 2014, paragraph 4 of subdivision (a) as separately amended by section 45 of part A and section 6 of part S of chapter 59 of the laws of 2014, paragraph 2 of subdivision (b) as amended by chapter 448 of the laws of 2009, subdivision (c) as added and subdivision (d) as relettered by section 2 of part J of chapter 59 of the laws of 2015, is amended to read as follows:

§ 28. Empire state commercial production credit. (a) Allowance of credit. (1) A taxpayer which is a qualified commercial production company, or which is a sole proprietor of a qualified commercial production company, and which is subject to tax under article nine-A or twenty-two of this chapter, shall be allowed a credit against such tax, pursuant to the provisions referenced in subdivision (c) of this section, to be computed as provided in this section. Provided, however, to be eligible for such credit, at least seventy-five percent of the production costs (excluding post production costs) paid or incurred directly and predominantly in the actual filming or recording of the qualified commercial must be costs incurred in New York state. The tax credit allowed pursu-

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

LBD10113-01-9

ant to this section shall apply to taxable years beginning before January first, two thousand twenty-four.

(2) The state has annually seven million dollars in total tax credits to disburse to all eligible commercial production companies. The seven million dollars in total tax credits shall be allocated according to subparagraphs (i)[~~,~~] **and** (ii) [~~and (iii)~~] of this paragraph:

(i) [~~The state annually will disburse one million of the total seven million in tax credits to all eligible production companies and 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) of twenty percent of the qualified production costs paid or incurred in the production of a qualified commercial, provided that the qualified production costs paid or incurred are attributable to the use of tangible property or the performance of services within the state in the production of such qualified commercial. To be eligible for said credit the total qualified production costs of a qualified production company must be greater in the aggregate during the current calendar year than the average of the three previous years for which the credit was applied. Provided, however, that until a qualified production company has established a three year history, the credit will be based on either the previous year or the average of the two previous years, whichever period is longer for the qualified production company seeking the credit. If the qualified production company has never applied for the growth credit, the previous year's data will be used to create a benchmark. The tax credit shall be applied only to the amount of the total qualified production costs of the current calendar year that are greater than the total amount of production costs of the appropriate measurement period as described in this subparagraph. The tax credit must be distributed to eligible production companies on a pro rata basis, provided, however, that no such qualified production company shall receive more than three hundred thousand dollars annually for such credit. The credit shall be allowed for the taxable year in which the production of such qualified commercial is completed.~~

~~(ii)~~] The state annually will disburse [~~three~~] **four** million of the total seven million in tax credits to all eligible production companies who film or record qualified commercials within the metropolitan commuter transportation district as defined in section twelve hundred sixty-two of the public authorities law. 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) of [~~five~~] **twenty** percent of the qualified production costs paid or incurred in the production of a qualified commercial, provided that the qualified production costs paid or incurred are attributable to the use of tangible property or the performance of services within the state in the production of such qualified commercial. To be eligible for said credit the total qualified production costs of a qualified production company must be greater than five hundred thousand dollars in the aggregate during the calendar year. Such credit will be applied to qualified production costs exceeding five hundred thousand dollars in a calendar year.

[~~(iii)~~] **(ii)** The state annually will disburse three million of the total seven million in tax credits to all eligible production companies who film or record a qualified commercial outside of the metropolitan commuter transportation district as defined in section twelve hundred sixty-two of the public authorities law; provided, however, that if, after July thirty-first the state reviews all applications from eligible production companies who film or record a qualified commercial outside

of the metropolitan commuter district for a given year, tax credits remain unallocated under this subparagraph, those credits shall be allotted to the credits set forth in subparagraph (i) of this paragraph for use consistent with the purposes of such subparagraph. 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) of [~~five~~] **thirty** percent of the qualified production costs paid or incurred in the production of a qualified commercial, provided that the qualified production costs paid or incurred are attributable to the use of tangible property or the performance of services within the state in the production of such qualified commercial. To be eligible for said credit the total qualified production costs of a qualified production company must be greater than one hundred thousand dollars in the aggregate during the calendar year. Such credit will be applied to **all** qualified production costs [~~exceeding one hundred thousand dollars~~] in a calendar year.

(3) No qualified production costs used by a taxpayer either as the basis for the allowance of the credit provided for under this section or used in the calculation of the credit provided for under this section shall be used by such taxpayer to claim any other credit allowed pursuant to this chapter.

(4) Notwithstanding any provisions of this section to the contrary, a corporation or partnership, which otherwise qualifies as a qualified commercial production company, and is similar in operation and in ownership to a business entity or entities taxable, or previously taxable, under section one hundred eighty-three or one hundred eighty-four or former section one hundred eighty-five of article nine; article nine-A or thirty-three of this chapter or which would have been subject to tax under article twenty-three of this chapter (as such article was in effect on January first, nineteen hundred eighty) or which would have been subject to tax under article thirty-two of this chapter (as such article was in effect on December thirty-first, two thousand fourteen) or the income or losses of which is or was includable under article twenty-two of this chapter shall not be deemed a new or separate business, and therefore shall not be eligible for empire state commercial production benefits, if it was not formed for a valid business purpose, as such term is defined in clause (D) of subparagraph one of paragraph (o) of subdivision nine of section two hundred eight of this chapter and was formed solely to gain empire state commercial production credit benefits.

(b) Definitions. As used in this section, the following terms shall have the following meanings:

(1) "Qualified production costs" means production costs only to the extent such costs are attributable to the use of tangible property or the performance of services within the state directly and predominantly in the production (including pre-production and post-production) of a qualified commercial.

(2) "Production costs" means any costs for tangible property used and services performed directly and predominantly in the production (including pre-production and post-production) of a qualified commercial. "Production costs" shall not include (i) costs for a story, script or scenario to be used for a qualified commercial and (ii) wages or salaries or other compensation for writers, directors, including music directors, producers and performers (other than background actors with no scripted lines who are employed by a qualified company and musicians). "Production costs" generally include technical and crew production costs, such as expenditures for commercial production facili-

ties and/or location costs, or any part thereof, film, audiotape, videotape or digital medium, props, makeup, wardrobe, commercial processing, camera, sound recording, scoring, set construction, lighting, shooting, editing and meals. For purposes of this section, "post production costs" include the production of original content for a qualified commercial employing techniques traditionally used in post-production for visual effects, graphic design, animation, and musical composition. However, where the commercial consists in its entirety of techniques such as visual effects, graphic design, or animation, such costs incurred in the production of the commercial, when occurring in New York, shall be deemed qualified production costs for the purposes of this section. Provided further, however, that "post production costs" shall not include the editing of previously produced content for a qualified commercial.

(3) "Qualified commercial" means an advertisement **of any length** that is recorded on film, audiotape, videotape or digital medium in New York for multi-market distribution by way of radio, television networks, cable, satellite [~~or~~], motion picture theaters**, internet or downloaded application (app)**. "Qualified commercial" shall not include (i) news or current affairs program, interview or talk program, network promos, i.e., commercials promoting television series or movies, "how-to" (i.e., instructional) commercial or program, commercial or program consisting entirely of stock footage, trailers promoting theatrical films, sporting event or sporting program, game show, award ceremony, daytime drama (i.e., daytime "soap opera"), or "reality" program, or (ii) a production for which records are required under section 2257 of title 18, United States code, to be maintained with respect to any performer in such production (reporting of books, commercials, etc. with respect to sexually explicit conduct).

(4) "Qualified commercial production company" is a corporation, partnership, limited partnership, or other entity or individual which or who is principally engaged in the production of a qualified commercial and controls the production of the qualified commercial and is not the distributor**,** or **the** contracting entity for production of such commercial**, nor is a variable interest entity of such distributor or contracting entity**.

(c) The department of economic development shall submit, on or before December first of each year, to the governor, the director of the division of the budget, the temporary president of the senate, and the speaker of the assembly an annual report including, but not limited to, the following information regarding the previous calendar year:

(1) the total dollar amount of credits allocated, the name and address of each qualified commercial production company allocated credits under this section, the total amount of credits allocated to each qualified commercial production company, the total amount of qualified production costs and production costs for each qualified commercial production company, and the estimated number of employees, credit-eligible man hours, and credit-eligible wages associated with each qualified commercial production company allocated credits under this section;

(2) for qualified commercial production companies that were allocated credit pursuant to subparagraph [~~(ii)~~] **(i)** of paragraph two of subdivision (a) of this section: the name and address of each qualified commercial production company, the total dollar amount of credits allocated, the total amount of credits allocated to each qualified commercial production company, total qualified production costs and production costs for each qualified production company, and the estimated number of

employees, credit-eligible man hours, and credit-eligible wages associated with each qualified commercial production company that filmed or recorded a qualified commercial within the district;

(3) for qualified commercial production companies that were allocated credit pursuant to subparagraph [~~(iii)~~] **(ii)** of paragraph two of subdivision (a) of this section: the name and address of each qualified commercial production company, the total dollar amount of credits allocated, the total amount of credits allocated to each qualified commercial production company, total qualified production costs and production costs for each qualified production company, and the estimated number of employees, credit-eligible man hours, and credit-eligible wages associated with each qualified commercial production company that filmed or recorded a qualified commercial outside the district; and

(4) the amount of credits reallocated to all eligible qualified commercial production companies pursuant to subparagraph [~~(iii)~~] **(ii)** of paragraph two of subdivision (a) of this section.

(5) The report may also include any recommendations for changes in the calculation or administration of the credit, recommendations regarding continuing modification or repeal of this credit, and any other information regarding this credit as may be useful and appropriate.

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

(1) article 9-A: section 210-B: subdivision 23.

(2) article 22: section 606: subsection (jj).

§ 2. This act shall take effect immediately.