

STATE OF NEW YORK

2966

2019-2020 Regular Sessions

IN SENATE

January 31, 2019

Introduced by Sen. BENJAMIN -- read twice and ordered printed, and when printed to be committed to the Committee on Investigations and Government Operations

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

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

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

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

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

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

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

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

55 (B) Eligible production costs shall not include: (i) costs for tangi-
56 ble property or services used or performed outside of this state, (ii)

performance fees for featured artists or featured guest artists receiving royalties or advances on royalties or special performance fees (other than those that would normally be collected by a performing rights organization) pursuant to an agreement directly with the producer or employer, (iii) salaries or related compensation for producers or songwriters, (iv) composer, artist or producer residual royalties or advances, (v) licensing fees for samples, (vi) interpolations or other music clearance costs, (vii) mastering or post-production expenditures for projects that were not principally tracked and recorded in this state, (viii) any costs associated with manufacturing, duplication, packaging, distribution, promotion, marketing or touring not specifically outlined in this subparagraph, or (ix) local transportation expenditures directly related to music production and provided at or to the site of such music production. With respect to the production of a music video, eligible production costs are those defined in paragraph two of subdivision (b) of section twenty-four of this article. 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 applications 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-three.

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

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

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

53. Empire state music production credit. (a) 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.

(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.

§ 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 music</u>	<u>Amount of credit under</u>
<u>production credit under</u>	<u>subdivision fifty-three</u>
<u>subsection (jjj)</u>	<u>of section 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 music 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.

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

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

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

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

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

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

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

1 section, such excess shall be treated as having been applied for on the
2 first day of the subsequent taxable year.

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

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

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

51 (3) "Qualified digital gaming media production costs" means digital
52 gaming media production costs only to the extent such costs are attrib-
53 utable to the use of property or the performance of services by any
54 persons within the state directly and predominantly in the creation,
55 production or modification of digital gaming related media. Such total
56 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 (kkk).

§ 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 (kkk)</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 (kkk) to read as follows:

(kkk) 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, 2019 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 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

1 procedure act, such rules and regulations may be adopted on an emergency
2 basis if necessary to meet such December 31, 2019 deadline.

3 § 10. Subdivision 13 of section 352 of the economic development law is
4 REPEALED.

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

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

13 (a) as a financial services data center or a financial services back
14 office operation;

15 (b) in manufacturing;

16 (c) in software development and new media;

17 (d) in scientific research and development;

18 (e) in agriculture;

19 (f) in the creation or expansion of back office operations in the
20 state;

21 (g) in a distribution center;

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

27 (i) as an entertainment company; ~~or~~

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

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

30 3. For the purposes of this article, in order to participate in the
31 excelsior jobs program, a business entity operating predominantly in
32 manufacturing must create at least five net new jobs; a business entity
33 operating predominately in agriculture must create at least five net new
34 jobs; a business entity operating predominantly as a financial service
35 data center or financial services customer back office operation must
36 create at least twenty-five net new jobs; a business entity operating
37 predominantly in scientific research and development must create at
38 least five net new jobs; a business entity operating predominantly in
39 software development must create at least five net new jobs; a business
40 entity creating or expanding back office operations must create at least
41 twenty-five net new jobs; [~~a business entity operating predominately in~~
42 ~~music production must create at least five net new jobs,~~]

43 a business entity operating predominantly as an entertainment company must create
44 or obtain at least one hundred net new jobs; or a business entity oper-
45 ating predominantly as a distribution center in the state must create at
46 least fifty net new jobs, notwithstanding subdivision five of this
47 section; or a business entity operating predominately as a life sciences
48 company must create at least five net new jobs; or a business entity
49 must be a regionally significant project as defined in this article; or

50 5. A not-for-profit business entity, a business entity whose primary
51 function is the provision of services including personal services, busi-
52 ness services, or the provision of utilities, and a business entity
53 engaged predominantly in the retail or entertainment industry, other
54 than a business operating as an entertainment company as defined in this
55 article [~~and other than a business entity engaged in music production~~],
56 and a company engaged in the generation or distribution of electricity,

1 the distribution of natural gas, or the production of steam associated
2 with the generation of electricity are not eligible to receive the tax
3 credit described in this article.

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

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

13 § 13. The economic development law is amended by adding a new section
14 243 to read as follows:

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

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

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

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

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

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

1 partnership or a shareholder in a subchapter S corporation, the amount
2 of tax credit earned by each entity must be included in the report
3 instead of information about the taxpayer claiming the tax credit, and
4 (iii) information identifying the project associated with each taxpayer
5 for which a tax credit was claimed under section forty-four or forty-
6 five of the tax law.

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

24 § 14. This act shall take effect immediately and shall apply to taxa-
25 ble years beginning on January 1, 2020 and before January 1, 2025;
26 provided that sections one through eight of this act shall expire and be
27 deemed repealed December 31, 2024.