

# STATE OF NEW YORK

4107--A

2021-2022 Regular Sessions

## IN SENATE

February 2, 2021

Introduced by Sen. BRESLIN -- read twice and ordered printed, and when printed to be committed to the Committee on Budget and Revenue -- recommitted to the Committee on Budget and Revenue 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:

1 Section 1. The tax law is amended by adding a new section 45 to read  
2 as follows:

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

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

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

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

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

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

1 sible by the general public including industrial or other private  
2 purposes, and political advocacy purposes.

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

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

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

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

36 (2) Article twenty-two: section six hundred six, subsection (i), para-  
37 graph one, subparagraph (B), clause (xlvi).

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

39 § 2. Section 210-B of the tax law is amended by adding a new subdivi-  
40 sion 55 to read as follows:

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

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

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

1	<u>(xlvi) Empire state digital</u>	<u>Amount of credit</u>
2	<u>gaming media production</u>	<u>under subdivision</u>
3	<u>credit under subsection (nnn)</u>	<u>fifty-five of section</u>
4		<u>two hundred ten-B</u>

5 § 4. Section 606 of the tax law is amended by adding a new subsection  
6 (nnn) to read as follows:

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

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

17 § 5. The state commissioner of economic development, after consulting  
18 with the state commissioner of taxation and finance, shall promulgate  
19 regulations by December 31, 2022 to establish procedures for the allo-  
20 cation of tax credits as required by subdivision (a) of section 45 of  
21 the tax law. Such rules and regulations shall include provisions  
22 describing the application process, the due dates for such applications,  
23 the standards which shall be used to evaluate the applications, the  
24 documentation that will be provided to taxpayers substantiate to the New  
25 York state department of taxation and finance the amount of tax credits  
26 allocated to such taxpayers, under what conditions all or a portion of  
27 this tax credit may be revoked, and such other provisions as deemed  
28 necessary and appropriate. Notwithstanding any other provisions to the  
29 contrary in the state administrative procedure act, such rules and regu-  
30 lations may be adopted on an emergency basis if necessary to meet such  
31 December 31, 2022 deadline.

32 § 6. The economic development law is amended by adding a new section  
33 242 to read as follows:

34 § 242. Reports on the digital gaming industries in New York. 1. The  
35 empire state development corporation shall file a report on a biannual  
36 basis with the director of the division of the budget and the chair-  
37 persons of the assembly ways and means committee and senate finance  
38 committee. The report shall be filed no later than thirty days before  
39 the mid-point and the end of the state fiscal year. The first report  
40 shall cover the calendar half year that begins on January first, two  
41 thousand twenty-four. Each report must contain the following informa-  
42 tion for the covered calendar half year:

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

45 (b) the number of digital gaming projects, which have been allocated  
46 tax credits of less than one million dollars per project, and the total  
47 dollar amount of credits allocated to those projects distributed by  
48 region pursuant to subdivision (b) of section forty-five of the tax law;

49 (c) the number of digital gaming projects, which have been allocated  
50 tax credits of more than one million dollars, and the total dollar  
51 amount of credits allocated to those projects distributed by region  
52 pursuant to subdivision (b) of section forty-five of the tax law;

53 (d) a list of each eligible digital gaming project, which has been  
54 allocated a tax credit enumerated by region pursuant to subdivision (b)  
55 of section forty-five of the tax law, and for each of those projects,  
56 (i) the estimated number of employees associated with the project, (ii)

1 the estimated qualifying costs for the projects, (iii) the estimated  
2 total costs of the project, (iv) the credit eligible employee hours for  
3 each project, and (v) total wages for such credit eligible employee  
4 hours for each project; and

5 (e) (i) the name of each taxpayer allocated a tax credit for each  
6 project and the county of residence or incorporation of such taxpayer  
7 or, if the taxpayer does not reside or is not incorporated in New York,  
8 the state of residence or incorporation; however, if the taxpayer claims  
9 a tax credit because the taxpayer is a member of a limited liability  
10 company, a partner in a partnership or a shareholder in a subchapter S  
11 corporation, the name of each limited liability company, partnership or  
12 subchapter S corporation earning any of those tax credits must be  
13 included in the report instead of information about the taxpayer claim-  
14 ing the tax credit, (ii) the amount of tax credit allocated to each  
15 taxpayer; provided however, if the taxpayer claims a tax credit because  
16 the taxpayer is a member of a limited liability company, a partner in a  
17 partnership or a shareholder in a subchapter S corporation, the amount  
18 of tax credit earned by each entity must be included in the report  
19 instead of information about the taxpayer claiming the tax credit, and  
20 (iii) information identifying the project associated with each taxpayer  
21 for which a tax credit was claimed under section forty-five of the tax  
22 law.

23 2. The empire state development corporation shall file a report on a  
24 triennial basis with the director of the division of the budget and the  
25 chairpersons of the assembly ways and means committee and senate finance  
26 committee. The first report shall be filed no later than March first,  
27 two thousand twenty-five. The report must be prepared by an independent  
28 third party auditor and include: (a) information regarding the empire  
29 state digital gaming production credit program including the efficiency  
30 of operations, reliability of financial reporting, compliance with laws  
31 and regulations and distribution of assets and funds; (b) an economic  
32 impact study prepared by an independent third party of the program with  
33 special emphasis on the regional impact by region and the total dollar  
34 amount of credits allocated to those projects distributed by region  
35 pursuant to subdivision (b) of section forty-five of the tax law; and  
36 (c) any other information or statistical information that the commis-  
37 sioner of economic development deems to be useful in analyzing the  
38 effects of the programs.

39 § 7. This act shall take effect immediately and shall apply to taxable  
40 years beginning on January 1, 2022 and before January 1, 2027; provided  
41 that sections one through four of this act shall expire and be deemed  
42 repealed December 31, 2026.