

# STATE OF NEW YORK

4107--B

2021-2022 Regular Sessions

## IN SENATE

February 2, 2021

Introduced by Sens. BRESLIN, KENNEDY -- 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 -- 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; to amend the state finance law, in relation to creating the empire state digital gaming diversity job training development fund; 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

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

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1 outside such metropolitan commuter transportation district shall be  
2 eligible for a credit of ten percent of such eligible production costs  
3 in addition to the credit specified in paragraph two of this subdivi-  
4 sion.

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

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

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

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

interactive game or software that is used predominately for: electronic commerce (retail or wholesale purposes other than the sale of video or interactive games), gambling (including activities regulated by a New York gaming agency), exclusive local consumption for entities not accessible by the general public including industrial or other private purposes, and political advocacy purposes.

(2) "Digital gaming media production costs" means any costs for property used and wages or salaries paid to individuals directly employed for services performed by those individuals directly and predominantly in the creation of a digital gaming media production or productions. Digital gaming media production costs include but shall not be limited to payments for property used and services performed directly and predominantly in the development (including concept creation), design, production (including concept creation), design, production (including testing), editing (including encoding) and compositing (including the integration of digital files for interaction by end users) of digital gaming media. Digital gaming media production costs shall not include expenses incurred for the distribution, marketing, promotion, or advertising content generated by end-users or other costs not directly and predominantly related to the creation, production or modification of digital gaming media. In addition, salaries or other income distribution related to the creation of digital gaming media for any person who serves in the role of chief executive officer, chief financial officer, president, treasurer or similar position shall not be included as digital gaming media production costs. Furthermore, any income or other distribution to any individual who holds an ownership interest in a digital gaming media production entity shall not be included as digital gaming media production costs.

(3) "Qualified digital gaming media production costs" means digital gaming media production costs only to the extent such costs are attributable to the use of property or the performance of services by any persons within the state directly and predominantly in the creation, production or modification of digital gaming related media. 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 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-five.

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

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

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

55. 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.

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

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

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

(nnn) 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.

(3) With regard to certificates of tax credit issued, the commissioner of economic development shall reduce by one-half of one percent the amount of credit allowed to a taxpayer and this reduced amount shall be reported on a certificate of tax credit issued pursuant to this section and the regulations promulgated by the commissioner of economic development to implement this credit program.

(4) By January thirty-first of each year, the commissioner of economic development shall report to the comptroller the total amount of such reductions of tax credit during the immediately preceding calendar year. On or before March thirty-first of each year, the comptroller shall transfer without appropriations from the general fund to the empire state digital gaming diversity job training development fund established under section ninety-seven-bbbbbb of the state finance law an amount equal to the total amount of such reductions reported by the commissioner of economic development for the immediately preceding calendar year.

§ 5. The state commissioner of economic development, after consulting with the state commissioner of taxation and finance, shall promulgate regulations by December 31, 2022 to establish procedures for the allocation of tax credits as required by 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 procedure act, such rules and regulations may be adopted on an emergency basis if necessary to meet such December 31, 2022 deadline.

§ 6. 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

1 basis with the director of the division of the budget and the chair-  
2 persons of the assembly ways and means committee and senate finance  
3 committee. The report shall be filed no later than thirty days before  
4 the mid-point and the end of the state fiscal year. The first report  
5 shall cover the calendar half year that begins on January first, two  
6 thousand twenty-four. Each report must contain the following informa-  
7 tion for the covered calendar half year:

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

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

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

18 (d) a list of each eligible digital gaming project, which has been  
19 allocated a tax credit enumerated by region pursuant to subdivision (b)  
20 of section forty-five of the tax law, and for each of those projects,  
21 (i) the estimated number of employees associated with the project, (ii)  
22 the estimated qualifying costs for the projects, (iii) the estimated  
23 total costs of the project, (iv) the credit eligible employee hours for  
24 each project, and (v) total wages for such credit eligible employee  
25 hours for each project; and

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

44 2. The empire state development corporation shall file a report on a  
45 triennial basis with the director of the division of the budget and the  
46 chairpersons of the assembly ways and means committee and senate finance  
47 committee. The first report shall be filed no later than March first,  
48 two thousand twenty-five. The report must be prepared by an independent  
49 third party auditor and include: (a) information regarding the empire  
50 state digital gaming production credit program including the efficiency  
51 of operations, reliability of financial reporting, compliance with laws  
52 and regulations and distribution of assets and funds; (b) an economic  
53 impact study prepared by an independent third party of the program with  
54 special emphasis on the regional impact by region and the total dollar  
55 amount of credits allocated to those projects distributed by region  
56 pursuant to subdivision (b) of section forty-five of the tax law; and

1 (c) any other information or statistical information that the commis-  
2 sioner of economic development deems to be useful in analyzing the  
3 effects of the programs.

4 § 7. The state finance law is amended by adding a new section 97-bbbbb  
5 to read as follows:

6 § 97-bbbbb. Empire state digital gaming diversity job training devel-  
7 opment fund. 1. There is hereby established in the joint custody of the  
8 commissioner of taxation and finance and the comptroller, a special fund  
9 to be known as the empire state digital gaming diversity job training  
10 development fund.

11 2. Such fund shall consist of the funds transferred by the comptroller  
12 to the fund from the general fund without appropriation, as determined  
13 under subsection (nnn) of section six hundred six of the tax law. Noth-  
14 ing contained herein shall prevent the state from receiving grants,  
15 gifts, or bequests for the fund and depositing them into the fund  
16 according to law.

17 3. Monies in the fund shall be expended only for job creation and  
18 training programs approved by the commissioner of economic development  
19 that support efforts to recruit, hire, promote, retain, develop and  
20 train a diverse and inclusive workforce as production company employees  
21 in the digital gaming industry within the state of New York including,  
22 but not limited to, those programs that promote development in econom-  
23 ically distressed areas of the state. The commissioner of economic  
24 development shall promulgate regulations that set forth relevant defi-  
25 nitions, minimum standards, and criteria for such fund and eligible  
26 training programs.

27 4. Monies shall be payable from the fund on the audit and warrant of  
28 the comptroller on vouchers approved and certified by the commissioner  
29 of economic development.

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